91-284

NO. _____

IN THE

Supreme Court of the United States

_____ TERM, 1991

MARY E. BARGER,
Plaintiff-Petitioner

v.

PETROLEUM HELICOPTERS, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Defendants-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement entered into between an LHWCA claimant and a third-party defendant for the payment of a sum certain to claimant following the rendition of judgment against that third party, without the express written approval of the longshore employer/carrier, serves to preclude said claimant from future compensation benefits, where the employer/carrier was notified of the agreement and the employer/carrier was not paying compensation benefits to claimant.

LIST OF PARTIES

The undersigned, counsel of record for Plaintiff-Petitioner, Mary E. Barger, certifies that the following parties have an interest in the outcome of this case:

(1) Mary E. Barger — Plaintiff/Petitioner

(2) Mary Ellen Blade — Attorney for Plaintiff/Petitioner

(3) Petroleum Helicopters, Inc. — Defendant/Respondent

(4) American Home Assurance Co. — Defendant/Respondent

(5) C. Theodore Alpaugh, III, Vance E. Ellefson — Attorneys for Defendants

(6) United States Department of Labor Office of Workers Compensation

(7) Samuel J. Oshinsky — Attorney for Department of Labor

(8) Donald Shire — Attorney for Department of Labor

(9) Benefits Review Board

(10) Solicitor General of the United States

MARY ELLEN BLADE

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To The Honorable Justices Of The Supreme Court Of The United States Of America:

Petitioner, MARY E. BARGER, respectfully prays that a Writ of Certiorari issue to review the decision rendered in this case by the United States Court of Appeals for the Fifth Circuit.

OFFICIAL AND UNOFFICIAL REPORTS

Barger v. Petroleum Helicopters, Inc., 514 F.Supp. 1199 (Eastern District Texas 1981), appears as Appendix A.

Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (5th Cir. 1982), rehearing and rehearing en banc denied January 6, 1983, rehearing opinion amended, January 13, 1983, appears as Appendix B.

No. 82-1632 *Mary E. Barger, Petitioner vs. Petroleum Helicopters, Inc.*, 461 U.S. 958, 77 L Ed 2d 1316, 103 S Ct 2430. May 31, 1983. Petition for Writ of Certiorari to the United States Supreme Court of Appeals for the Fifth Circuit denied. Appears as Appendix C.

Decision and Order — Granting Benefits *In the Matter of Walter Barger, deceased, claimant vs. Petroleum Helicopters, Inc., employer and American Home Assurance Company, carrier,* Case No. 87-LHC-597 OWCP No. 7-739001 rendered by Administrative Law Judge John C. Holmes, dated November 18, 1987, is attached as Appendix D.

Mary E. Barger (widow of Walter Barger) vs. Petroleum Helicopters, Incorporated and American Home Assurance Company, Decision and Order, BRB No. 88-101, November 22, 1989. Attached as Appendix E.

Petroleum Helicopters, Inc. and American Home Assurance Co., Petitioners vs. Mary E. Barger and Director, Office of Workers Compensation Programs, United States Department of Labor, Respondents, 910 F2d 276 (5th Cir. 1990) is attached hereto as Appendix F.

Nicklos Drilling Co. and Compass Insurance Co., Petitioners v. Fliyd Coward and Director, Office of Workers

Compensation Programs, U.S. Department of Labor, Respondents and Petroleum Helicopters, Inc. and American Home Assurance Company, Petitioners, vs. Mary E. Barger and Director, Office of Workers Compensation Programs, United States Department of Labor, Respondents, 927 F.2d 828 (1981), which is the decision of the 5th Circuit sitting En Banc, and which appears as Appendix G.

Kahny vs. Director, Officer of Workers' Compensation Programs, U.S. Department of Labor and Arrow Contractors of Jefferson, Inc. and Liberty Mutual Insurance Company, U.S. Court of Appeals for the Fifth Circuit, No. 83-4101 (March 8, 1984). Attached as Appendix H.

JURISDICTION

The opinions and judgment in the United States Court of Appeals for the Fifth Circuit, sitting En Banc, was rendered in this case on March 29, 1991. This Petition for Writ of Certiorari was filed within 90 days of March 29, 1991, as is required by 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTES INVOLVED

33 U.S.C. § 933(g)(1) and (2) which state: (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement

is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into. (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any setlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this act.

STATEMENT OF THE CASE

Mary E. Barger, Petitioner herein, is the widow of Walter Barger, an employee of Petroleum Helicopters, Inc. (hereinafter referred to as PHI). Walter Barger was killed on April 23, 1976, when the helicopter he was piloting malfunctioned and crashed in the Gulf of Mexico. Although PHI initially paid some voluntary compensation benefits to Petitioner, Mrs. Barger, PHI terminated those benefits when Mrs. Barger filed an action under the Jones Act and General Maritime Law on April 17, 1978, against both Petroleum Helicopters and Bell Helicopters (the manufacturer of the helicopter in question). On May 21, 1981, Judge Fisher rendered judgment against both Petroleum Helicopters and Bell Helicopters in the total amount of $660,368.00 (plus $10,000.00 each to Mrs. Barger's two (2) children) to be apportioned 80% and 20%, respectively, based on degree of fault. *See Barger v. Petroleum Helicopters, Inc.*, 514 F.Supp. 1199

(E.D. Tex. 1981). The decision of the trial court was appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed Judge Fisher's finding of fact that the amphibious helicopter being piloted by Mr. Barger was a vessel within the meaning of the Jones Act and instead held that Mrs. Barger's exclusive remedy was the Longshore & Harbor Workers' Compensation Act. *See Barger v. Petroleum Helicopters, Inc.*, 682 F.2d 337 (5th Cir. 1982). The Fifth Circuit then remanded this case to Judge Fisher for entry of judgment in accordance with the Fifth Circuit's opinion.

On August 19, 1983, Judge Fisher entered judgment in accordance with the Fifth Circuit's opinion, dismissing the Jones Act suit against PHI and entered judgment in favor of plaintiffs against Bell Helicopter Company. In this judgment, Judge Fisher referred to an agreement entered into between claimant and Bell as follows: "Bell . . . entered into an agreement in which plaintiffs' claims would be compromised if a finding of liability were made against Bell . . . , and the claims of plaintiffs having been compromised and settled *subsequent to* the trial of this cause, the claims of plaintiffs against Bell . . . are hereby dismissed." [Emphasis added].

PHI was notified of the agreement between Mrs. Barger and Bell Helicopters.

After exhaustion of the credit given PHI for the money received from Bell Helicopters, the Department of Labor ordered compensation benefits to be paid to Mrs. Barger. PHI appealed that award to the Administrative Law Judge, John C. Holmes. In his "Decision and Order-Granting Benefits", Judge Holmes found that the claimant, Mrs. Barger, was not a "person entitled to compensation"

as that term is understood in 33 U.S.C. § 933(g) and therefore held that no written approval from the employer was necessary of any agreement between Mrs. Barger and Bell Helicopters. Because of his ruling that no written approval was required under § 33(g), Judge Holmes did not reach the issue of whether the agreement between Mrs. Barger and Bell Helicopters constituted a settlement agreement for purposes of § 33(g). The Benefits Review Board affirmed the decision and order of the Administrative Law Judge. PHI appealed the decision of the Board to the United States Court of Appeals for the Fifth Circuit. The three judge panel vacated the judgment of the Benefits Review Board and remanded to the Administrative Law Judge on September 4, 1990. However, Mrs. Barger filed a Petition for Rehearing En Banc, which was granted, and her case was consolidated with that of *Nicklos Drilling Co. vs. Floyd Cowart, et al,* and the decision, en banc, was rendered in both cases on March 29, 1991, affirming the three judge panel's decision. Three Fifth Circuit Judges, Politz, King and Johnson, dissented from the En Banc Opinion. This Petition for Writ of Certiorari seeks a review of the Fifth Circuit's decision.

ARGUMENT

Introduction

The intent of the Longshore and Harbor Workers' Compensation Act, 933 U.S.C. 901, *et seq.* is to compensate injured longshore and harbor workers for injuries suffered in the course and scope of their employment. Congress intended, and the Supreme Court has held, that the Act should be construed in order to further its purpose of compensating longshoremen and harbor workers,

'and in a way which avoids harsh and incongruous results." *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *Northeast Marine Terminal Company, Inc. v. Caputo,* 432 U.S. 249, 268 (1977).

In keeping with this legislative intent, Section 933(g) of the Act provides that the employer be notified prior to any settlement between an injured worker and a third party. As the Fifth Circuit succinctly pointed out in *Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644 (5th Cir. 1986), the legislative intent behind Section 933(g) was twofold, namely:

1). To protect the employer's right to directly recover its compensation liability from the third party tortfeasor; and

2). To protect the employer's statutory right to a set-off against its compensation liability for any amount received by the employee from the third party tortfeasor.

Collier, supra at 646.

This intent, enunciated by the *Collier* court, is clearly in keeping within the overall intent of the Act as set forth in *Voris, supra* and *Northeast Marine, supra.* The Act was meant as social legislation, to compensate longshore and harbor workers for their injuries. Section 933(g) was enacted to encourage employers to pay their compensation liability, by preserving those employer's right to recover such payments from a third party tortfeasor. By requiring notification of any third party settlement, Section 933(g) ensures employers that settlement will not be confected without their approval, thereby alleviating the employers' fear that they will not be recompensed for

compensation benefits paid by themselves, but ultimately deemed owed by a third party.

The question that arises is whether Section 933(g) was intended to provide *equal* protection, both to those employers who *are* fulfilling the intent of the Act by paying the claimant compensation benefits at the time of the third party settlement; and those employers who *are not* fulfilling the intent of the act by withholding such compensation benefits. By protecting those employers who *are* paying the claimant compensation benefits at the time of settlement, Section 933(g) encourages employers to fulfill their obligation under the Act. Interpreting Section 933 (g) to provide *equal* protection to those employers who are *withholding* such compensation benefits would not only circumvent Congress' intent to encourage employers to promptly compensate longshore and harbor workers, but would have the converse effect of encouraging employers to withhold compensation benefits until such time as they are judicially ordered to pay such benefits. In any case in which the possibility of settlement arose, the employer could withhold compensation benefits, and withhold written approval of a settlement agreement, in hopes of ultimately avoiding the payment of any compensation whatsoever. There would be no means to protect a claimant against such withholding. Such an interpretation is clearly contrary to the underlying intent of the Act.

An alternative interpretation, and the one urged by petitioner in the captioned matter, is to read Section 933(g) as providing different levels of protection for the two classes of employers. Under this interpretation, Section 933(g) would be interpreted as requiring *written approval* by an employer who was *paying* compensation at the time of the third party settlement, and as requiring

notification to an employer who was *not paying* compensation at the time of the third party settlement. Such an interpretation would serve to reinforce the underlying intent of Section 933(g), i.e., encouraging employers to promptly pay compensation benefits, by affording such employers greater protection; while conversely mitigating the potential abuse of Section 933(g), by affording lesser protection to those employers who are not paying compensation benefits.

From 1927 until 1972, Section 933(g) read substantially as follows:

> "(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval."
>
> 44 Stat. 1441; 73 Stat. 392.

There is a dearth of cases construing Section 933(g) during this period. The leading cases are *Chapman v. Hoage,* 296 U.S. 526, 56 S. Ct. 333 (1936) (933(g) does not bar a claim for compensation unless the carrier is actually prejudiced by the claimant's failure to prosecute his third party action); *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 88 S. Ct. 1140 (1968) (claimant's consent to a court ordered remittitur is not a compromise within the meaning of 933(g) because the employer's interest was protected by the trial court in ordering the remittitur); and *Bell v. O'Hearne,* 284 F.2d 777 (4th Cir. 1960) (after claimant's third

party action was tried to judgment, settling for a lesser amount was not a compromise as long as the employer was credited for the full amount, because the employer's interest was fully protected).

The paucity of court litigation involving Section 933(g) prior to 1972 is not unusual given the primary purpose of the 1972 amendments to the Act. The primary purpose of the 1972 amendments was to limit the available actions in tort for persons covered by the Act in exchange for increasing compensation benefits. Prior to 1972, claimant's were allowed a greater variety of third party tort actions against a larger class of potential defendant's, including the claimant's employer. Consequently, claimant's third party actions usually settled for a much greater amount than similar actions following the amendment's. As claimants were more likely to receive third party settlements which exceeded the amount to which they would be entitled to under the Act, further compensation was often barred under Section 933(f). Thus, in the more usual cases, the claimant had no incentive to press his claim against the employer under the Act because the claimant was not entitled to any more compensation from the employer.

The 1972 amendments:

In 1972 Section 933(g) was amended to provide in pertinent part:

> (g) Compromise obtained by person entitled to compensation.
>
> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be

> entitled to under this chapter the employer shall be entitled to under this chapter the employer shall be liable for compensation determined in subsection (f) of this section *only if written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise* on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within days after such compromise is made.
>
> 33 U.S.C. 933(g).

Since 1972, the above underlined portion of Section 933(g) has been interpreted by numerous administrative and judicial tribunals, with the same result.

The issue was first faced by the administrative law judge in *O'Leary v. Southeast Stevedore Company*, 5 BRBS 16 (1976). In *O'Leary* the administrative law judge noted that Section 933(g) "presuppose[s] that compensation is not only payable under the Act, but that both claimant and respondent accept that compensation is payable." *Id.* at 24. The decision continued:

> "Only when the decision of the Benefits Review Board and the Order of Judge Bernstein pursuant to that Decision were not appealed, was Claimant's status as such a person assured. Until that time she did not know and Respondent's did not know if she was a person entitled to compensation."
>
> *Id.* at 25.

Thus, the *O'Leary* judge held:

> "Entitled to compensation means presently recognized as entitled to compensation; it does not mean one who, after arduous years of litigation may finally be

> declared to be entitled to compensation. The permission of the employer and its carrier to settle a third party action must be obtained only where compensation benefits are acknowledged. Congress did not intend that permission to settle a third party action must be obtained from a Respondent who (although with apparently valid reason) denies any responsibility to make compnsation benefits."
>
> *Id.*

In upholding the administrative law judge's determination, the Benefits Review Board noted that a different interpretation:

> "could result in a claimant not being paid compensation, yet the claimant would be afraid to make a third party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money . . ."
>
> 7 BRBS 144, 149 (1977).

Thus, the Benefits Review Board reasoned that "the very language [of Section 933(g)] contemplat[es] that [the] employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination." *Id.* at 148. The *O'Leary* decision was subsequently affirmed by the Ninth Circuit. 622 F.2d 595 (9th Cir. 1980) (unpublished, reproduced in its entirety in appendix). Since the original Administrative Law Judge decision, *O'Leary* has remained the seminal law concerning applicability of Section 933(g).[1]

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1. See e.g., *O'Leary,* 5 BRBS 161 (ALJ, 1976), 7 BRBS 144 (1977), *aff'd mem.* 622 F.2d 596 (9th Cir. 1980) (unpublished); *Caranante v. International Terminal Operated Company, Inc.,* 7 BRBS 248 (1977); *Wall v. Wall,* 15 BRBS 197 (ALJ, 1982);

The Fifth Circuit faced the issue four years after *O'Leary* in *Kahny v. Director, United States Dept. of Labor and Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212, *aff'd mem.* 729 F.2d 757 (5th Cir. 1984) (unpublished, reproduced in its entirety in appendix). The Fifth Circuit held:

> "We find this analysis [*O'Leary*] fully consistent with the language, legislative history, and rationale of Section 933(g). The critical time for the determination whether one is a "person entitled to compensation" is the time of the challenged settlement. If, at that time, the employer is not making voluntary payments, and no award had been ordered by an ALJ, the claimant is not a "person entitled to compensation" under Section 933(g), and is not obliged to

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Kahny v. Arrow Contractors of Jefferson, Inc., 15 BRBS 212 (1982), *aff'd. mem.* 729 F.2d 757 (5th Cir. 1984) (unpublished); *Todd v. J & M Welding Contractors*, 16 BRBS 434 (ALJ, 1984); *Wilson v. Triple A Machine Shop*, 17 BRBS 471 (ALJ, 1985); *Lindsay v. Bethlehem Steel Corporation*, 18 BRBS 20 (1986), 22 BRBS 206 (1989); *Dorsey v. Cooper Stevedoring Company, Inc.*, 18 BRBS 25 (1986); *Nesmith v. Farrell American Station*, 19 BRBS 176 (1986); *Cernousek v. Braswell Shipyards, Inc.*, 19 BRBS 796 (ALJ, 1987); *Quinn v. Washington Metropolitan Area Transit Authority*, 20 BRBS 65 (1986); *Lewis v. Norfolk Shipbuilding and Dry Dock Corporation*, 20 BRBS 126 (1987); *Evans v. Horne Brothers, Inc.*, 20 BRBS 226 (1988); *Mobley v. Bethlehem Steel Corporation*, 20 BRBS 239 (1988), *aff'd.* 24 BRBS 49, 920 F.2d 558 (9th Cir. 1990); *Blake v. Bethlehem Steel Corporation*, 21 BRBS 49 (1988); *Castorina v. Lykes Brothers Steamship Company, Inc.*, 21 BRBS 136 (1988); *Anweiler v. Avondale Shipyards, Inc.*, 21 BRBS 271 (1988); *Armand v. American Marine Corporation*, 21 BRBS 305 (1988); *Fisher v. Todd Shipyards Corporation*, 21 BRBS 323 (1988); *O'Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988); *Cunningham v. Kaiser Steel Corporation*, 21 BRBS 154 (ALJ, 1988); *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989); *Glenn v. Todd Pacific Shipyards Corp.*, 22 BRBS 254 (ALJ, 1989); *Sellman v. I.T.O. Corporation of Baltimore*, 24 BRBS 11 (1990); *Cretan v. Bethlehem Steel Corporation*, 24 BRBS 35 (1990); *Reaux v. H & H Welders & Fabricating*, 24 BRBS 7 (ALJ, 1990).

> secure prior approval for a third party tort settlement."
>
> *Kahny,* unpublished opinion at 7, 8.

The 1984 amendments:

In 1984, Section 933(g) was amended by Congress. The 1984 amendments preserved pre-1984 Section 933 (g), replete with the "persons entitled to compensation" language, and redesignated pre-1984 Section 933(g) as post-1984 Section 933(g)(1). The legislative history signifies no intent by Congress to overrule the interpretation of Section 933(g) adopted by *O'Leary* and its progeny. Congress is presumed to be aware of the administrative and judicial interpretation of a statute and to adopt that interpretation when it re-acts a statute without change. *Lorillard v.Pons,* 434 U.S. 575, 580, 98 S. Ct. 866, 870 (1978); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 366 (1951).

Applying the above rule of statutory construction, the administrative law judge in *Wilson v. Triple A Machine Shop,* 17 BRBS 471 (ALJ, 1985) noted:

> "the key words for purposes of the *O'Leary* decision, *supra,* and the others following it are "the person entitled to compensation." . . . The 1984 amendment did not change this language. On the contrary, [Section 9]33(g) begins: "If the person entitled to compensation." . . . Thus it can be inferred that where a claimant is not being paid voluntarily or under an award he is not "a person entitled to compensation" and [Section 9]33(g)(1) does not apply."
>
> *Id.* at 477.

Clearly, as Congress did not remove the "person entitled to compensation" language from Section 933(g), and the legislative history does not indicate any intent by Congress to overrule the *O'Leary* line of jurisprudence, the *O'Leary* definition of "person entitled to compensation remains viable.

Given this, the only remaining issue before this Court, is whether the 1984 additions to Section 933(g), specifically, Section 933(g)(2), has any bearing on Petitioner's right to receive compensation. Section 933(g)(2) provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.
>
> 33 U.S.C. 933(g)(2).

In construing this language, the Court is obliged to give effect, if possible, to every word Congress used. *Reiter v. Sonotone Corp.*, 422 U.S. 330, 339 (1979); *U.S. v. Menasche,* 348 U.S. 528, 538-539 (1955). In this regard it is noted that Section 933(g)(2) applies "regardless of whether the employer or the employer's insurer has made payment or acknowledged entitlement to benefits under this chapter." This language, strikingly similar to the *O'Leary* language defining "persons entitled to conmpensation", is noticeably absent from Section 933 (g)(1). By adding this language to Section 933(g)(2),

Congress clearly intended to preserve the interpretation of Section 933(g)(1) by the courts in *O'Leary* and its progeny. This serves not only to buttress the continuing viability of *O'Leary*, but further signifies the legislature's intent to distinguish between those claimants who are "persons entitled to compensation" and those claimants who are *not* "persons entitled to compensation".

O'Leary's continued viability is further buttressed by Congress' continued use of the language "persons entitled to compensation" in Section 933(g)(1) after 1984, as opposed to Congress' use of the language "employee" in Section 933(g)(2). This language evidences an intent that Section 933(g)(1) apply only to those claimants who are "persons entitled to compensation", as defined in *O'Leary*, and that Section 933(g)(2) apply to all claimants who are "employees", irrespective of whether said employees are also "persons entitled to compensation". It is respectfully submitted that this attempt to distinguish the two classes of claimants indicates a clear intendment to codify the *O'Leary* distinction. This distinction between the two classes is evident throughout the amended Section 933(g) as will be discussed infra.

It is further noted that the notice requirements of Section 933(g)(2) are disjunctive. A claimant's right to compensation benefits is forfeited under Section 933(g)(2): (1) if no written approval of the settlement is obtained and filed as required by paragraph 933(g)(1), *or* (2) if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person.

The first disjunctive portion applies to those claimants who did not acquire the written approval required by

Section 933(g)(1). Since under *O'Leary* the only claimants required to acquire written approval by Section 933(g)(1) are "persons entitled to compensation", this first disjunctive portion makes Section 933(g)(2) applicable to those "persons entitled to compensation" who did not comply with the written approval requirements of Section 933(g)(1). As Petitioner is not a "person entitled to compensation", this first portion of the disjunctive test does not serve to bring Petitioner within the purview of Section 933(g)(2).

However, the second portion of the disjunctive test does serve to bring Petitioner under the mandate of Section 933(g)(2). This test is not limited to those claimants who are required to obtain written approval under Section 933(g)(1), i.e. "persons entitled to compensation". Rather, this second portion applies to all claimants who are "employees", included, *but not limited to,* "persons entitled to compensation."

Notably, the second portion of the disjunctive test requires the "employee" to *notify* the employer of any settlement, as distinguished from the requirement of *written approval* imposed on "persons entitled to compensation" by Section 933(g)(1) .Indeed, the first portion of the Section 933(g)(2) disjunctive test reiterates Section 933 (g)(1)'s requirement of written approval *for persons entitled to compensation*". Clearly, this wording indicates an intent to distinguish between the type of notice required by the various classes of claimants. While Section 933(g)(1) claimants, i.e. "persons entitled to compensation", are required to obtain *written approval,* the broader class of Section 933(g)(2) claimants, i.e. "employees", are required only to *notify* the employer.

As the administrative law judge in *Wilson, supra* noted:

> "The distinction between approval and notice is highlighted by the fact that settlement and judgment are mentioned in the same phrase: "if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person . . ." Notice of judgment makes sense; approval of judgment would not. In *Banks, supra,* the Supreme Court expressly held that a judge's action in reducing a jury's award adequately protected the employer's interest in the adequacy of the award—and that is the only interest the employer has in the third party action.
>
> *Wilson, supra* at 478.

A statute should be interpreted so as not to render any one part inoperative. *Colautti v. Franklin,* 439 U.S. 379, 392 (1977), citing, *Menasche, supra* at 538-539. To interpret Section 933(g)(2) any other way, would be to ignore this rule of statutory construction. This is clear once it is realized that the Section 933(g)(1) claimants, i.e. "persons entitled to compensation", necessarily fall into the broader class of Section 933(g)(2) claimants, i.e. "employees". Given this, to interpret Section 933 (g)(2) as requiring *written* notification for all claimants, would render one of the portions of the disjunctive tests inoperative. If Congress had intended this statutory interpretation, i.e. 'notify' - 'obtain written approval', then the second portion of the Section 933(g)(2) disjunctive test would have sufficed to cover the situation currently described in the first portion. By making Section 933(g)(2) disjunctive, Congress clearly intended to retain the distinction enunciated by *O'Leary,* and to further clarify

O'Leary by proscribing the slighter burden required by claimants who were not "persons entitled to compensation" under Section 933(g)(1).

The above enunciated interpretation of Section 933 (g)(2) has been accepted by the Benefits Review Board in *Dorsey v. Cooper Stevedoring, Inc.*, 18 BRBS 25 (1986) and *Pinell v. Patterson Service*, 22 BRBS 61 (1989).

In *Dorsey*, the Board addressed the effect of the addition of Section 933(g)(2) on claimants who were not receiving compensation benefits at the time of the third party settlement. The *Dorsey* Board held that this Section clearly applies regardless of whether the employer has made any compensation benefits to the claimant. *Dorsey, supra* at 29, 30. The Board continued:

> "It [Section 933(g)(2)] applies if no written approval is obtained pursuant to Section 933(g)(1) *or* if the employee fails to notify the employer of any settlement or judgment in a third party action."
>
> *Id.*

The Board in *Dorsey* concluded that where a claimant is *not* a "person entitled to conmpensation" he is required to *either* obtain written approval *or* notify the employer of the third party settlement. *Id.*

The Board further enunciated its position in the recent case of *Pinell, supra.* In *Pinell,* the Board held that Section 933(g)(2) does not modify the written approval requirement of Section 933(g)(1), but rather, was intended to address an entirely different situation. *Pinell, supra.* The *Pinell* Board noted:

> "Thus, under subsection [9]33(g)(1), just as under the 1972 version of Section 933(g), claimant is barred from receiving further compensation under the Act if he is a 'person entitled to compensation', i.e. employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. Under subsection [9]33(g)(2), regardless of whether employer has made payments or acknowledged entitlement, the employer must at a minimum be given notice of a settlement or compensation and medical benefits are barred; *written approval is not required.*"
>
> *Id.*

Petitioner was not a "person entitled to compensation" under any of these interpretations. The employer/carrier had cut off her benefits and controverted her right to review thereon following her filing of a Jones Act Lawsuit. Thus, Petitioner was required only to notify Petroleum Helicopters of the settlement agreement; *written approval was not required.* It is undisputed that employer/carrier was notified of the agreement to compromise after judgment with the third party, Bell Helicopters.

The Fifth Circuit's interpretation:

In reversing the Board's affirmance of Petitioner's compensation award, the Fifth Circuit held:

> ". . . we hold that there are no exceptions whatever to the "unqualified" language of Section 933. Rather, "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier . . ." 33 U.S.C. Section 933(g)(1). In this instance "only" means "only" and, absent any room for inter-

> pretation or construction, we give it its intended meaning. Should Congress wish to give it another, it need only say so."
>
> Panel decision p. 5424.

Petitioner agrees with this holding. However, Petitioner must respectfully disagree with the Fifth Circuit's failure to follow the express "unqualified" language which it cites. Section 933(g)(1) provides that written approval is required when the claimant is a "person entitled to compensation." Petitioner is *not* a "person entitled to compensation." Thus, the "unqualified" language of Section 933(g)(1) does *not* apply to Petitioner.

Further, Petitioner respectfully submits that Congress has already enunciated its intent to limit the written approval requirement of Section 933(g)(1) by enacting Section 933(g)(2) in 1984. The interpretation and construction indicated by this enactment has been discussed in detail supra, and need not be reiterated here. Suffice it to say, that under the Supreme Court's rules of statutory interpretation and construction set out in *Colautti* and *Menasche,* the Fifth Circuit's broad-brushed interpretation of Section 933(g)(2) is insupportable.

In reaching its decision, the Fifth Circuit relied exclusively on their decision in *Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644 (5th Cir. 1986). The language in *Collier* is indeed strong.

> "Section 933(g)(1) is brutally direct: "the employer shall be liable for compensation . . . only if written approval of the settlement is obtained from the employer and the employer's carrier."
>
> *Collier* at 647.

By adopting this language on its face value, without taking into consideration the factual situation to which it pertained, the Fifth Circuit, circumvented the clear intent of the 1984 legislative amendments to the Act discussed supra. A brief review of the facts in *Collier,* bears this assertion out.

In *Collier,* claimant, David Collier, was injured while working as a helicopter pilot for PHI. *Collier* at 645. The injury occurred on the landing platform of a rig owned by Conoco. *Id.* Collier thereafter applied for and received benefits from PHI's insurance carrier. *Id.* Collier subsequently sued Conoco in Federal District Court, seeking $750,0000.00 in damages. *Id.* Collier settled his claim against Conoco on April 17, 1979. *Id.* This settlement was confected without the approval of PHI or its carrier, and compensation benefits were *terminated for that reason* on April 17, 1979. *Id.*

As the foregoing summary shows, David Collier was receiving compensation benefits from his employer/carrier at the time he settled with Conoco. Evaluating this situation under the *O'Leary* criteria, Collier was clearly a "person entitled to compensation", and thus was clearly under the purview of Section 933(g) (1). Examined in this light, *Collier's* harsh wording is correct. As to *"persons entitled to compensation",* Section 933(g)(1) is "brutally direct." David Collier, as a "person entitled to compensation" *was* entitled to benefits *only* if written approval of the settlement was obtained from the employer and the employer's carrier.

By contrast, the Administrative Law Judge in the case at bar, determined that Petitioner was *not* receiving compensation benefits at the time of his settlement with

Transco, and thus was *not* a "person entitled to compensation" under *O'Leary* and its progeny. Thus, Petitioner does not fall under the purview of Section 933(g)(1). Rather, Petitioner, as an "employee", but not a "person entitled to compensation", falls under the purview of Section 933(g)(2) and therefore need only *notify* the employer/carrier of his settlement with the third party. As Nicklos not only knew of the proposed settlement agreement, but actually paid it, Section 933(g)(2)'s notification requirement was clearly met, and Petitioner's right to compensation benefits was not forfeited.

The Ninth Circuit's interpretation:

The Fifth Circuit's determination is clearly at odds with the Ninth Circuit's decisions in *O'Leary,* (discussed supra) and *Bethlehem Steel Corp. v. Mobley,* 920 F.2d 558 (9th Cir. 1990). While *Bethlehem Steel* concerned a claimant's right to medical benefits, the decision discussed the interpretation of Section 933(g)(2).

> "Section [9]33(g)(2)'s notification requirement thus serves two purposes. First, it enables an employer to protect its right to set off the amount of a settlement against any future obligations it might have. See 33 U.S.C. 933(f). Second, it ensures that an employer is able to protect its right to reimbursement from the proceeds of a third-party settlement in the amount of any payment the employer has already made. . . . *So long as the employer has notice of the settlement before it has made any payments and before the Agency orders it to make any payments, the purposes of the statute are satisfied.*
>
> *Id.* at 561.

The above emphasized language in the decision enunciates the same criteria upon which *O'Leary* and its progeny

rely, indicating that *O'Leary* is still good law in the Ninth Circuit. Indeed, the Ninth Circuit held:

> "a claimant's notice to an employer of a third-party settlement before the employer has made any payments and before the Agency has announced any award is sufficient under section [9]33(g)(2).
>
> *Id. at 562.*

In the instant case, the employer carrier certainly had notice of said agreement to compensation after judgment while it was not paying Petitioner the compensation benefits she was due. It is clear that had Petitioner's claim arose in the Ninth Circuit, the court would have reached a different result.

The consequences of the Fifth Circuit's decision:

By its erroneous reliance on *Collier* the Fifth Circuit's decision in the captioned case sounds the death knell for literally thousands of past, pending and future claimants. The foreseeable problems caused by the Fifth Circuit's decision can arise in three distinct manners.

As to past claims, the Fifth Circuit's decision will have the effect of subjecting all claimant's who have received compensation after third party settlement pursuant to the *O'Leary* line of cases to claims for reimbursement from the employer's who paid these compensation benefits. As the Fifth Circuit's decision is clearly interpretive of existing law, rather than a substantive change in law, the decision will have retrospective effect.

As to pending claims, the administrative law judge in *Wilson, supra* enunciated the problem most clearly:

> "When the employer denies compensation liability and the claimant is disabled he is likely to have no income at all. He is under great pressure to settle his third party claim as quickly as possible, even for less than it is worth. The whole purpose of [Section 9]33(g) is to prevent inadequate settlements. If any settlement, even an inadequate one, simultaneously and automatically bars the claim to compensation, the employer is encouraged to defeat the purpose of [Section 9]33(g) by withholding its approval. Such a result is a dramatic injustice. Claimant has been forced to take less than he is entitled to by his employer, which profits from its own refusal to approve the settlement by being absolved of further compensation liability."
>
> *Wilson, supra* at 478, 479.

As to future claimant's, the injustice of the Fifth Circuit's decision is most clearly seen. As an example, the case of those claimants who have sustained an occupational disease is presented. These claimants have suffered injuries as diverse as grain dust asthma, pulmonary dysfunction, and asbestosis. These cases have many similar traits, namely:

1. The claimants know that they have contracted the disease.
2. The claimants are not currently disabled.
3. The claimants are therefore not "persons entitled to compensation."

These claimants, as a class, are often still employed in longshore work due to the relatively slow progression of their respective diseases. Given the transient nature of longshore work, these claimants do not yet know which of their numerous future employers will be ultimately

responsible for their compensation benefits. However, these claimants do know that they have contracted a disease that will undoubtedly lead to their future disability. They also know the identity of the third party responsible for said disease.

The Fifth Circuit's decision places these claimants in an untenable position. According to this decision, these claimants cannot settle their third party claims without first securing the written approval of the employer who will ultimately be responsible for their compensation benefits. As these claimants have not yet suffered a *manifest* disability, thus entitling them to compensation under the Act, the identity of the employer ultimately liable for their compensation benefits is as yet unknown. Meanwhile, the prescriptive period on their third party claims is currently running. The only way these claimants can hope to settle their claims before such claims are prescribed, is by hoping that somehow their disability manifests itself within the currently running prescriptive period. If, on the other hand, their disability does not manifest itself prior to prescription, these claimants will find their third party claims prescribed. Surely, given the liberal nature of the Act, such a result cannot have been anticipated by the drafters of the 1984 amendments.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

MARY E. BARGER

v.

PETROLEUM HELICOPTERS, INC.,

and

Bell Helicopters International, Inc.

Civ. A. No. B-77-180-CA.

UNITED STATES DISTRICT COURT,

E. D. Texas,

Beaumont Division.

May 21, 1981.

Action was brought against decendent's employer, engaged in business of transporting personnel to and from oil drilling rigs, and manufacturer of helicopter, to recover damages under the Jones Act arising from death of helicopter pilot. The District Court, Joe J. Fisher, J., held that where helicopter was physically designed for landings, takeoffs, and movement on water, helicopter was engaged in a maritime endeavor, and pilots were exposed to such hazards of the sea as drowning and storms, helicopter was a vessel for purposes of the Jones Act, and thus pilot, who had more than a mere transitory relationship with employer's fleet of helicopters, and whose duties contributed to the function of the vessel

in the most essential way, was a seaman.

Ordered accordingly.

Hubert Oxford, III, Benckenstein, McNicholas, Oxford, Radford, Johnson & Nathan, Beaumont, Tex., for plaintiffs.

Vance E. Ellefson, Lugenbuhl, Larzelere & Ellefson, New Orleans, La., for defendant Petroleum Helicopters, Inc., and intervenor American Home Assur. Co.

J. E. Williams, Jr., Fulbright & Jaworski, Houston, Tex., for defendant Bell Helicopters/Textron.

MEMORANDUM OPINION[1]

JOE J. FISHER, District Judge.

Just after sunrise on the morning of April 23, 1976, the helicopter piloted by the Plaintiffs' decedent, Walter Barger, crashed into the Gulf of Mexico some 40 miles off the coast of Louisiana. Barger and all eleven of his passengers were killed. The Plaintiffs[2] brought this suit pursuant to Rule 9(h) of the Federal Rules of Civil Procedure, the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761 et seq. (DOHSA), and the general maritime law to recover for Barger's death. The Defendants are Petroleum Helicopters, Inc. (PHI), Barger's employer and the owner of the helicopter, and Bell Helicopter/Textron (Bell), the helicopter's manufacturer. The cause of action against Bell is based

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1. This Memonradum Opinion constitutes the findings of fact and conclusions of law required by Rule 52, Fed. R. Civ. P.

2. The Plaintiffs are Mary Elizabeth Barger, the widow, and Elizabeth Jane and Randy Michael Barger, the children.

on Texas tort law applicable in admiralty through DOHSA, *see, e.g., Fosen v. United Technologies Corp.*, 484 F.Supp. 490, 496 S.D.N.Y.), *aff'd*, 633 F2d. 203 (2d Cir. 1980), and is pendent to the federal statutory and admiralty claims against PHI.[3] Trial was to the Court.

PHI is engaged in the business of transporting workers to and from drilling platforms in, among other places, the Gulf of Mexico off the coast of Texas and Louisiana. It maintains offices in Sabine Pass, Texas, and Cameron, Louisiana. Barger was employed by PHI as a pilot of one of its helicopters. On the day in question, Barger was operating a Bell 205A-1 PHI-owned helicopter bearing aircraft registration number N8167J from Cameron to a drilling rig owned by Blue Dolphin Corporation in the Gulf of Mexico. Barger was ferrying eleven Blue Dolphin employees to the rig. Approximately 40 miles offshore and 5 to 6 miles from the Blue Dolphin rig, the tail boom separated from the main body of the helicopter in flight, causing it to spin uncontrollably and crash into the Gulf.[4]

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3. The claims against Bell easily meet the requirements set out in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S. Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966), for the exercise of pendent jurisdiction: the federal claim must have sufficient substance to confer subject matter jurisdiction; the state and federal claims must derive from a common nucleus of operative fact; the nature of the plaintiffs' claims is such that they would ordinarily expect to try them all in one proceeding; and the decision to try the claims together must be justified by considerations of judicial economy, convenience, and fairness to the litigants. *See Connecticut General Life Ins. Co. v. Craton*, 405 F.2d 41, 48 (5th Cir. 1968). The exercise of discretion in favor of pendent jurisdiction is particularly appropriate in admiralty cases. *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 808-11 (2d Cir. 1971).

4. The evidence shows that the tail boom serves two very important functions: it acts as a counterweight to the main body of the helicopter, allowing the craft to fly on a level plane; and it

The tail boom separated when two of the four longeron fittings that attach the tail to the cabin failed. The evidence establishes that the upper left longeron fitting failed due to corrosion[5] and metal fatigue. The lower left longeron fitting failed immediately afterward, likewise due to corrosion and metal fatigue. Prior to the time of the crash, the two left fittings exhibited fatigue striations, which are marks on a fatigue fracture made by an advancing crack. The fatigue portions of the cracks were over an inch wide and an inch long in the upper left fitting and almost an inch and a half to an inch in the lower left. There were two cracks in each of the left longeronfittings. These cracks had been present for at least several hundred flight hours prior to the crash.

PHI had removed the tail boom from the helicopter in question three years and 3,747 flight hours prior to the crash. On reassembly, one of the bolts used was of an incorrect type and five of other fasteners were installed backwards.[6] Both the Bell instruction manual and PHI's own inspection and maintenance procedures required that the longeron fittings be visually inspected every 100 flight hours. PHI had knowledge that there could be problems with these fittings in a corrosive environment by virtue of its having submitted to Bell nearly three years earlier a Malfunction Defect Report (MDR) along

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provides sideways thrust through a tail rotor to overcome the tendency of the cabin to spin in a direction opposite to that of the blades. Therefore, when the tail boom separated from the cabin of Barger's helicopter, the cabin began to tumble forward and, at the same time, to spin at a rapid rate.

5. PHI operates its helicopters in a very coorosive, salt water and sea air environment.

6. The odd bolt was the closest to the fatigue area and of a slotter type, designed for use with a screwdriver. A gouge or nick was caused during installation when the screwdriver slipped from

with a failed upper left fitting.[7] In early 1974, Bell reported to PHI the cause of the failure, and orally advised a PHI employee that its inspection procedures should be modified so as to more closely inspect the longeron fittings, without providing specific instructions on how to do so.

PHI is the largest commercial helicopter firm in the world and clearly has the requisite experience and expertise to properly inspect and maintain its helicopters. In particular, PHI's mechanics are experts in the field of helicopter repair and maintenance, are FAA certified, and should be held to the standard of an expert. *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 464, 465—66 (5th Cir. 1976). As such, PHI could have been reasonably expected to devise a proper method of inspecting the longeron fittings on its helicopter, despite the lack of formal instructions from Bell.[8] In fact, the National Transportation Safety Board inspector assigned to this crash found that, prior to the crash, PHI had in fact established a procedure to inspect these fittings. The failure of PHI's employees to discover the cracks and the gouge in the two left longeron fittings during one of the 100 hour inspections that took place while the

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the head of this bolt and banged into the forging. The fatigue area spread, due to stress, from this gouge. Although the installation of incorrect and backward bolts would not have, alone, caused the fittings to fail, it is indicative of PHI's grossly inadequate maintenance program.

7. The evidence shows that the cause of the failure of the fitting that was the subject of the earlier MDR was mechnically identical to that of the upper left fitting on Barger's helicopter.

8. Prior to the accident, in addition to the oral warning noted above, Bell's maintenance manual called for a "thorough and searching" inspection of the helicopter, including the longeron fittings, every 100 hours of flight time.

cracks were in existence and visible for about 300 flight hours prior to the crash constitutes negligence, which was a contributing cause of the crash and the death of the Plaintiffs' decedent.

The evidence indicates that the tail boom of helicopters operating in a corrosive environment should be completely removed and carefully scrutinized at no more than 1,000 flight-hour intervals.[9] Such an inspection would have readily disclosed the fatigue cracks in the left longeron fittings. The failure of PHI to remove the tail boom from Barger's helicopter for a period in excess of 3,700 flight-hours constitutes negligence, which was a contributing cause of the crash made the basis of this suit. PHI's negligence in failing to perform this type of inspection is particularly blameworthy, as it previously had knowledge of the tendency of the longeron fittings to fail in the environment in which its business is conducted.

[1] The quantum of negligence required to impose liability under the Jones Act is very slight, and it need only be a contributing cause of the incident giving rise to the suit. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355, 361 (5th Cir. 1980); *Reyes v. Vantage Steamship Co.*, 609 F.2d 140, 142 (5th Cir. 1980); *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 329 (5th Cir. 1977); *Bush v. Texaco, Inc.*, 504 F. Supp. 670, 672 (E.D.Tex. 1981). The Plaintiffs easily satisfied this featherweight burden.

[2,3] The duty to provide a reasonably seaworthy vessel is absolute and is completly independent of the employer's

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9. This procedure is relatively simple to perform and takes approximately three hours to complete.

obligation to exercise reasonable care. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 327, 81 S.Ct. 6, 9, 5 L. Ed.2d 20 (1960); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549, 80 S.Ct. 926, 932, 4 L.Ed.2d 941 (1960). If, as the Plaintiffs contend, the helicopter, under the facts of this case, was a vessel within the meaning of the Jones Act and the general maritime law, then it is abundantly clear that it was not reasonably fit for its intended purpose and, therefore, unseaworthy. *Usner v. Luckenbach Overeseas Corp.*, 400 U.S. 494, 499, 91 S.Ct. 514, 517, 27 L.Ed.2d 562 (1971); *Mitchell*, 362 U.S. at 550, 80 S.Ct. at 933. The Court finds that such unseaworthy condition was a proximate cause of the crash.

[4] The helicopter was in normal use at the time of the crash, and was in substantially the same condition as when it was sold to PHI by Bell in 1970. The helicopter was designed so that a part which is subjected to a great amount of stress, the upper left longeron fitting, was located in a position not readily accessible for inspection. The evidence at trial shows that Bell could have designed the 205A-1 to eliminate the joint requiring longeron fittings completely, used fittings made of steel or some other non-critical alloy, placed the fittings on the outside of the craft for easy inspection, or provided an easily removable inspection panel on the skin of the tail boom.

Moreover, the Court finds that the upper left longeron fitting, which is subject to more stress while underway than the other three fittings, was of insufficient strength and design for the use for which it is intended. The benefits, if any, from the use of longeron fittings as described above are heavily outweighed by the risks such design imposes upon the user of the product. *Turner v. General*

Motors Corp., 584 S.W.2d 844, 847 & n. 1 (Tex. 1979). As designed, the Bell 205A-1 helicopter was defective and unreasonably dangerous within the meaning of section 402A of the Restatement (Second) of Torts (1965). *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 530 (Tex.Civ. App.—Corpus Christi 1979, wirt ref'd n.r.e.). Such defective design was a producing cause of the crash of April 23, 1976. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 & n. 3 (Tex. 1977).

The evidence unequivocally shows that Barger in no way contributed to causing the accident. In addition, there was nothing he could have done after the tail boom separated to prevent the crash. The Court finds that, on the occasion in question, the Plaintiffs' decedent was not negligent.

[5] The comparative fault of the Defendants will be assessed at 80% for PHI and 20% for Bell. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204, 98 L.Ed. 143 (1958); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 982 (5th Cir. 1978). *Cf. United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 95 S.Ct. 1708, 1713, 44 L.Ed.2d 251 (1975).

In order for the Plaintiffs to recover under the Jones Act, 46 U.S.C. § 688,[10] they must show that Barger was

10. The Jones Act provides, in pertinent part, that
Any seaman who shall suffer personal injury in the coure of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action

a seaman. *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 5, 66 S.Ct. 869, 871, 90 L.Ed. 1045 (1946); *Wixom v. Roland Marine & Manufacturing Co., Inc.*, 614 F.2d 956, 957 (5th Cir. 1980); *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 452 (5th Cir. 1980); *Wilkerson v. Movible Offshore, Inc.*, 496 F.Supp. 1279, 1282 (E.D. Tex. 1980). The Fifth Circuit has formulated a three-part test for determining whether a given employee is a seaman for purposes of the Jones Act:[11]

> (1) he must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or its operation or welfare in terms of its maintenance during its movement or during anchorage for its future trips.

Guidry v. South Louisiana Contractors, Inc., 614 F.2d at 452; *Guidry v. Continental Oil Co.*, 640., F.2d 523, 528 (5th Cir. 1981); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

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all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

11. A seaman for purposes of the Jones Act is also a seaman under the general maritime law and is, therefore, entitled to the warranty of seaworthiness. *Braen v. Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 132, 80 S. Ct. 247, 249, 4 L.Ed.2d 191 (1959); *The Osceola*, 189 U.S. 158, 175, 23 S. Ct. 483, 487, 47 L.Ed. 760 (1903).

[6, 7] The question of seaman status is virtually always an issue of fact for the factfinder. *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955), *rev'ing per curiam* 222 F.2d 382 (5th Cir.); *Landry v. Amaco Production Co.*, 595 F.2d 1070, 1071 (5th Cir. 1979). Moreover, "[t]here is nothing in the [Jones Act] to indicate that Congress intended the law to apply only to conventional members of a ship's company." *Robison*, 266 F. 2dat 780. Assuming for the moment that the helicopter in question was a vessel, there is no disputing that Barger had a more or less permanent connection with it. He had worked for PHI as a helicopter pilot from January of 1970 until his death. His was much more than a mere transitory relationship with PHI's fleet of crafts. *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277, 281 (5th Cir. 1981); *Davis v. Hill Engineering, Inc.* 549 F.2d 314, 326 (5th Cir. 1977).

Similarly, there can be no doubt that Barger's duties contributed to the function of the vessel in the most essential way. PHI has admitted as much. He was its pilot, navigator, and sole crewmember. The third part of the test for seamon status has been satisfied. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 433 n. 13 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618, 98 S. Ct. 2010, 56 L.Ed.2d 581 (1978).

[8] Now we come to the heart of this case: whether the helicopter was a vessel with the meaning of the Jones Act and the general maritime law. We start with the proposition that the Jones Act is remedial legislation and is to be broadly construed. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S. Ct. 173, 175, 77 L.Ed. 368 (1932); *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 224 (5th Cir. 1975); *Pure Oil Co. v. Suarez*, 346

F.2d 890, 895 (5th Cir. 1965), aff'd, 384 U.S. 202, 86 S. Ct. 1394, 16 L.Ed.2d 474 (1966). As Judge Wisdom Wrote in *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959),

> There is no reson for lamentations. Expansion of the terms "seaman" and "vessel" are [*sic*] consistent with the liberal construction of the Act that has characterized it from the beginning and is consistent with its purposes.

Id. at 780.

[9] The Bell 205A-1 helicopter involved in this case was equipped with pontoons, a life raft, and other life-saving apparatus. The pontoons were permanently affixed by Bell prior to sale to PHI and enabled the craft to land, take-off, float, and taxi on water. The helicopter lands on these rubberized floats each time it sets down, whether on land, on a drilling rig, or on water. There is no limitation on the distance a pontoon-fitted helicopter can taxi, but Bell recommends that this type helicopter not be operated where wave heights exceed 36 inches from trough to crest. Barger underwent extensive training on how to land, taxi, and take-off from water prior to being allowed to operate one of PHI's crafts.

The Merchant Marine Act of 1920,[12] of which the Jones Act is a part,[13] incorporates the definition of "vessel" contained in the Shipping Act of 1916,[14] as amended. This latter act provides as follows:

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12. Act of June 5, 1920, ch. 250, §§ 1-39, 41 Stat. 988-1008.

13. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007.

14. Act of September 7, 1916, ch. 451, §§ 1-36, 39 Stat. 728-38.

> The term "vessel" includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

Act of September 7, 1916, ch. 451, § 1, 39 Stat. 728, as amended by the Act of July 15, 1918, ch. 152, § 1, 40 Stat. 900, now codified as 46 U.S.C. § 801. *See also* 1 U.S.C. § 3.[15] This definition encompasses "special purpose structures not usually employed as a means of transport by water but designed to float on water." *Robison,* 266 F.2d at 779. A helicopter equipped with permanently affixed pontoons is certainly an artificial contrivance capable of being used as a means of transportaion and to float on water. However, the inquiry does not end there.

There is no hard and fast definition of vessel. As Judge Wisdom so aptly put it,

> Attempts to fix unvarying meanings have [*sic*] a firm legal significance to such terms as "seaman", "vessel", "member of a crew" must come to grief on the facts. These terms have such a wide range of meaning under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case.

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15. This statute similarly defines "vessel" as follows: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3.

Id. at 779—80. Recent cases in the Fifth Circuit establish the rule that "[i]n determining what is a vessel, we consider the purpose for which the craft is constructed and the business in which it is engaged." *Blanchard v. Engine & Gas Compressor Services, Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978) [citing *The Robert W. Parsons*, 191 U.S. 17, 24 S. Ct. 8, 48 L.Ed. 73 (1903)[16]]; *Guidry v. Continental Oil Co.*, 640 F.2d at 529 n. 18; *Smith v. Massman Construction Co.*, 607 F.2d 87, 88 (5th Cir. 1979); *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 823 (5th Cir. 1975), *cert. denied sub nom. H. B. Buster Hughes, Inc. v. Ocean Drilling & Exploration Co.*, 428 U.S. 1050, 96 S. Ct. 777, 46 L.Ed.2d 639 (1976); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999, 1001 (5th Cir.), *cert. denied*, 414 U.S. 868 94 S. Ct. 175, 38 L.Ed.2d 116 (1973).

Barger's helicopter was constructed for the purpose of transporting men and material across the navigable waters of the Gulf of Mexico. The craft was specifically designed for landings, take-offs, and movement on water. Thus, the first prong of the analysis has been met.

As noted above, PHI is the largest commercial helicopter firm in the world. They are engaged almost exclusively in the business of transporting personnel to and from oil drilling platforms located in the territorial and navigable waters of the United States and other countries. There is no doubt that this is a traditional maritime activity and that Barger's helicopter was the functional

16. The *Parsons* Court wrote that "neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed, and the business in which it is engaged." 191 U.S. at 30, 24 S. Ct. at 12.

equivalent of a crewboat.[17] *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 619 n. 2, 98 S. Ct. 2010, 2012 n. 2, 56 L.Ed.2d 581 (1978). The craft in question was engaged in a maritime endeavor sufficient to satisfy the second prong of our analysis.

Flotation on water does not alone qualify a given structure as a "vessel" for Jones Act purposes. The additional element of risk and exposure to the hazards of the sea must be present. *Hicks,* 512 F.2d at 823; *Atkins v. Greenville Shipbuilding Corp.,* 411 F.2d 279, 283 (5th Cir.), *cert. denied,* 396 U.S. 846, 90 S. Ct. 105, 24 L.Ed.2d 96 (1969). Barger and PHI's other pilots are certainly exposed to such hazards of the sea as drowning and storms, perhaps even to a greater degree than blue-water sailors.[18] *See Robison,* 266 F.2d at 780. When a PHI helicopter malfunctions in the way it did in this case, the pilot and passengers stand a far greater chance of losing their lives in the mishap than their counterparts aboard a traditional seagoing vessel.

In sum, the Court finds that, in the circumstances of this case, that the Bell 205A-1 helicopter piloted by Walter Barger was a vessel within the meaning of the Jones Act and the general maritime law of the United States, and that Barger was a seaman.

[10] PHI vigorously maintained throughout the trial that Barger was not a seaman but a longshoreman and,

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17. PHI admitted in its post-trial memorandum that "the helicopter in question was performing a maritime activity traditionally performed by waterborne vessels, i.e. transporting personnel engaged in the exploration for petroleum and minerals on the Outer Continental Shelf, between platforms and vessels, over navigable waters."

18. Barger's body was lost at sea and never recovered.

therefore, subject to the provisions of the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. (LHWCA). Yet, section 905(b) of the LHWCA gives an injured longshoreman the right to bring an action against the vessel owner for negligence.[19] The circumstance that the vessel owner and the employer are the same entity does not preclude such an action. *Smith v. M/V Captain Fred,* 546 F.2d 119, 123 (5th Cir. 1977).[20] While adhering to the finding that the helicopter in this case was a vessel, the Court finds, in the alternative, that should Barger be a longshoreman, the Plaintiffs have proved ample negligence and causation to support recovery against PHI under section 905(b) of the LHWCA.

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19. The relevant portion of the statute provides that:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vssel as a third party in accordance with the provisions of section 933 of this title.

33 U.S.C. § 905(b).

20. The House Report accompanying the 1972 amendments to the LHWCA supports this proposition:

> The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S. S. Yaka,* 373 U.S. 410, 83 S. Ct. 1349, 10 L.Ed.2d 448 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 731, 87 S. Ct. 1419, 18 L.Ed.2d 488 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injurd longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.

H.R. Rep. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Admin. News, pp. 4698, 4705 (footnotes omitted).

The Court allowed PHI to amend its answer some two years after this action was commenced in order to assert its right to limit its liability to the value of the vessel and pending freight at the end of the voyage, pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 et seq. (Lmitation Act). Although the procedures outlined in section 185 of the Limitation Act were not followed, the law is settled that limitation of liability may be pled by way of answer, in which case the requirements of section 185 do not apply.[21] *Murray v. New York Central R.R. Co.*, 287 F.2d 152, 153 (2d Cir.), *cert, denied,* 366 U.S. 945, 81 S. Ct. 1674, 6 L.Ed.2d 856 (1961); *Deep Sea Tankers, Ltd. v. The Long Branch,* 258 F.2d 757, 772 (2d Cir. 1958), *cert. denied,* 358 U.S. 933, 79 S. Ct. 316, 3 L.Ed.2d 305 (1959); *The Chickie,* 141 F.2d 80, 84 (3d Cir. 1944); *Signal Oil & Gas Co. v. The Barge W—*701, 468 F. Supp. 802, 813 (E.D.La. 1979). *But see Odegard v. Quist,* 199 F.Supp. 449, 451—52 (E.D.N.Y. 1961).

[11, 12] Yet, the Limitation Act will not operate in this case to PHI's benefit. Section 183 provides, in Pertinent part, that:

> The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, *without the privity or knowledge of such owner or owners,* shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

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21. Section 185 requires that the petition to limit liability be filed within 6 months of notice of a claim, and the vessel owner must deposit the value of the vessel into the registry of the court or with a trustee appointed by the court.

46 U.S.C. § 183(a) (emphasis supplied). For its own fault and neglect, the vessel owner remains subject to full liability. *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 205, 88 S. Ct. 379, 387, 19 L.Ed.2d 407 (1967); *American Car & Foundry Co. v. Brassert,* 289 U.S. 261, 264, 53 S. Ct. 618, 619, 77 L.Ed. 1162 (1933). Moreover, the vessel owner has the burden of proving the absence of privity and knowledge. *Coryell v. Phipps,* 317 U.S. 406, 409, 63 S.Ct. 291, 292, 87 L.Ed. 363 (1943.)[22]

The terms "privity" and "knowledge" are nowhere defined in the Limitation Act. The Supreme Court has written that "[p]rivity, like knowledge, turns on the facts of particular cases."[23] *Coryell,* 317 U.S. at 411, 63 S. Ct. at 293; *Gibboney v. Wright,* 517 F.2d 1054, 1057 (5th Cir. 1975). The abundance of fault shown on the part of supervisory personnel of the corporate vessel owner brings this case within the exception to the Limitation Act. One of PHI's three vice presidents, a Mr. Tysdale, admitted from the witness stand that he knew of the previous upper left longeron failure that occurred in 1973 and of the tendency of this part to fail in a salt water environment. He testified that, despite this knowl-

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22. "It seems reasonable that the shipowner who invokes the Limitation Act, should bear the burden of proving the absence of privity and knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge." G. Gilmore & C. Black, *The Law of Admiralty,* § 10-25 at 895-96 (2d ed. 1975). The burden is initially on the injury party, however, to prove negligence or unseaworthiness. *In re Brasea, Inc.,* 583 F.2d 736, 738 (5th Cir. 1978).

23. Professors Gilmore's and Black's formulation is more colorful: those terms "are empty containers into which the courts are free to pour whatever content they will." G. Gilmore & C. Black, *The Law of Admiralty,* § 10-20 at 877 (2d ed. 1975).

edge, PHI did not make any changes in its monthly inspection procedures to more closely scrutinize this crucial area. He testified that PHI relied on Bell for its maintenance and inspection procedures and up-dates.

> Privity and knowledge are deemed to exist where the owner had the means of knowledge or, as otherwise stated, where knowledge would have been obtained from reasonable inspection. Knowledge or privity of supervisory shore personnel is sufficient to charge a corporation.

China Union Lines, Ltd. v. A. O. Andersen & Co., 364 F.2d 769, 787, (5th Cir. 1966), *cert. denied*, 386 U.S. 933, 87 S. Ct. 955, 17 L.Ed.2d 805 (1967). The Court finds that PHI failed to carry its burden of proof by a preponderance of the evidence. The facts of this case show neglect on the part of PHI more than sufficient to satisfy the definition of privity and knowledge.

[13] The Court has previously found that the vessel was in an unseaworthy condition. The Court now finds that PHI did not discharge its burden of showing the exercise of due diligence to ascertain the craft's seaworthiness. This alone, is sufficient ground for denying PHI's petition to limit its liability under the Limitation Act. *The Malcolm Baxter, Jr.*, 277 U.S. 323, 331, 48 S. Ct. 516, 517, 72 L.Ed. 901 (1928); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1155 (2d Cir. 1978), *cert. denied*, 440 U.S. 959, 99 S. Ct. 1499, 59 L.Ed.2d 772 (1979); *Federazione Italiana Dei Corsorzi Agrari v. Mandask Compania de Vapores, S.A.*, 388 F.2d 434, 439 (2d Cir.), *cert. denied*, 393 U.S. 828, 89 S. Ct. 92, 21 L. Ed.2d 99 (1968). PHI is not entitled to limit

its liability.[24]

[14] Walter Barger was 47 years old at the time of his death and had work-life expectancy of 17.068 years and a life expectancy of 26.69 years. At the time of his death he was earning $15,230.00 per year base pay from PHI. The evidence shows that he was a very competent pilot and that he would have been promoted pursuant to the PHI seniority system ahead of those pilots with less seniority than he. His lost earnings from the time of his death to trial, allowing for personal consumption and income tax, were established to be $62,810.00.

[15] The salaries of Barger's contemporaries at PHI grew prior to trial at the rate of 17.65%.[25] The appropriate discount rate is 6.97%. Applying these two rates to Barger's yearly salary and allowing for income tax,[26] 20%

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24. It may well be that the helicopter, although a vessel for Jones Act purposes, is not a vessel for purposes of limitation of liability. This is so because, while the Jones Act is to be broadly interpreted, *see, e.g., Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375, 53 S. Ct. 173, 175, 77 L.Ed. 368 (1932), the Limitation Act is construed narrowly. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437, 74 . Ct. 608, 622, 98 L.Ed. 806 (1954) (Black, J., dissenting); *Rowe v. United States Fidelity & Guaranty Co.*, 375 F.2d 215, 219 (4th Cir. 1967); *In re Chinese Maritime Trust, Ltd.*, 361 F.Supp. 1175, 1178 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 1357 (2d Cir. 1973), *cert. denied sub nom. Chinese Maritime Trust, Ltd. v. Panama Canal Co.*, 414 U.S. 1143, 94 S. Ct. 894, 39 L.Ed.2d 98 (1974).

25. Any increase in growth due to inflation was excluded from this figure by the Plaintiffs' economist. *See Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 434-35 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618, 98 S. Ct. 2010, 56 L.Ed.2d 581 (1978); *Johnson v. Penrod Drilling Co.*, 510 F.2d 234, 241 (5th Cir.), *cert. denied*, 423 U.S. 839, 96 S. Ct. 68, 46 L.Ed.2d 58 (1975).

26. The Court will recognize the current income tax tables found in 26 U.S.C. § 1 as a fair estimate of the taxes that would have been paid by the Plaintiffs' decedent in the future. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L.Ed.2d 689 (1980).

personal consumption, and 12% business-related expenses, the Court finds the lost earnings in the future to be $575,468.00.

[16] The evidence adduced at the trial indicates that Walter Barger was extremely helpful around the house. He performed such services for his family as repairing automobilies, air conditioners, refrigerators, lights, bathrooms, and the like. The Court finds that the loss of household services over Barger's life expectancy, discounted at 6.97%, amounts to $22,090.00.

[17, 18] Neither DOHSA nor the Jones Act allow recovery of damages for loss of society where a seaman's death occurs on the high seas. *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 622, 98 S. Ct. 2010, 2018, 56 L.Ed. 581 (1978) (DOHSA); *Ivy v. Security Barge Lines, Inc.,* 606 F.2d 524, 529 (5th Cir. 1979) (en banc), *cert, denied,* 446 U.S. 956, 101 S. Ct. 27, 65 L.Ed.2d 1173 (1980) (Jones Act.)[27] The Court concludes that the Plaintiffs should not revover any damages for loss of society.[28] The two children, Elizabeth Jane and Randy Michael Barger, are nevertheless, entitled to recover for "the loss of that care, counsel, training and education which [they] might, under the evidence, have reasonably received from [Walter Barger], and which can only be supplied by the service of another for compensation." *Michigan Central R.R. Co. v. Vreeland,* 227

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27. Quite incongruously, loss of society damages are recoverable where the injury or death is caused by unseaworthiness in territorial waters. *American Export Lines, Inc. v. Alvez,* 446 U.S. 274, 100 S. Ct. 1673, 64 L.Ed.2d 284 (1980); *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed.2d 9 (1974).

28. Loss of society damages encompass love, affection, care, attention, companionship, comfort, and protection. *Gaudet,* 414 U.S. at 585, 94 S. Ct. at 814.

U.S. 59, 71, 33 S. Ct. 192, 196, 57 L.Ed. 417 (1913). This item is recoverable both under the Jones Act, *id.*; *Higginbotham v. Mobil Oil Corp.*, 360 F.Supp. 1140, 1149 (W.D.La.1973), *aff'd in part, rev'd in part,* 545 F.2d 422 (5th Cir. 1977), rev'd on other grounds, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), and under DOHSA. *Solomon v. Warren,* 540 F.2d 777, 789 (5th Cir. 1976), *cert. dism'd sub nom. Warren v. Serody,* 434 U.S. 801, 98 S. Ct. 28, 54 L.Ed.2d 59 (1977).

The evidence shows that Walter Barger was a loving husband and father who assisted and advised his children in their studies and their lives. The Court, therefore, finds that Elizabeth Jane Barger, who was 18 years old but living at home at the time of her father's death, should be awarded $10,000.00 for the loss of her father's nurture, counsel, and guidance. The Court further finds that Randy Michael Barger, who was 15 at the time of his father's death, should also be awarded $10,000.00 for his loss of nurture, counsel, and guidance.

The Plaintiffs seek an award for the loss of various "fringe benefits" that Barger would have received from PHI in addition to his salary had he not been killed. No evidence was presented at the trial from which the Court can ascertain a specific amount for the loss of fringe benefits. Due to this lack of evidence, the Court will decline to award any sum for this element.

Another item of damages sought is the loss of Barger's naval retirement pay.[29] It appears that Barger made an election to receive a greater amount of monthly pay, which would cease upon his death, rather than to receive a reduced amount and provide for his wife by way of

29. Walter Barger was a retired submariner, a seaman by profession.

an annuity after his death, pursuant to 10 U.S.C. § 1431. If Barger had intended that his family would receive the benefit of his naval retirement, he would have made such an election under the statute. The Court will make no award for this item of damages.

The final element of damages sought by the Plaintiffs is an award for Barger's conscious pain and suffering during the interval between the time the helicopter began to spin and tumble uncontrollably until it hit the water. According to a Mr. Messer, ten to fifteen minutes after sunrise on the day of the crash, he heard a Mayday and someone crying for help over his radio. The testimony shows that PHI's pilots normally operated their crafts at 500—800 feet above the surface of the water. At that height, it would have taken Barger's helicopter approximately ten seconds to hit the water. Moreover, due to the violent spinning and tumbling, it is doubtful that Barger or his passengers would have been alive all the way to the water.

[19, 21] There can be no award for conscious pain and suffering where the decedent was in all probability rendered immediately unconscious as a result of his injuries. *Mpiliris v. Hellinic Lines, Ltd.*, 323 F.Supp. 865 894 (S.D.Tex.1970), *aff'd*, 440 F.2d 1163 (5th Cir. 1971). Where the immediacy of the injuries and the absence of specific evidence renders too speculative a finding that the decedent consciously suffered pain, any award for this element would be improper. *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 288 (5th Cir. 1974), *cert. denied*, 423 U.S. 886, 96 S. Ct. 163, 46 L.Ed.2d 118 (1975). The evidence of the violent gyrations of his craft indciates that it was more likely than not that

Barger was rendered unconscious immediately. Therefore, the claim for conscious pain and suffering will be denied.

[22] American Home Assurance Company, PHI's workers' compensation carrier, has paid the sum of $26,-408.72 to Mrs. Barger as death benefits under the LHWCA. PHI is entitled to credit this sum against its portion of the judgment.

[23, 25] In admiralty cases, an award of prejudgment interest is the rule rather than the exception. *Noritake Co., Inc. v. M/V Hellenic Champion,* 627 F.2d 724, 728 (5th Cir. 1980); *McCormack v. Noble Drilling Corp.,* 608 F.2d 169, 175 (5th Cir. 1979). Although not proper in a pure Jones Act case, this rule applies where suit is also brought, as here, in admiralty. *Doucet v. Wheless Drilling Co.,* 467 F.2d 336, 340 (5th Cir. 1972). Where such an award is denied, the trial court must detail the factual basis for the denial. *Mecom v. Levingston Shipbuilding Co.,* 622 F.2d 1209, 1217 (5th Cir. 1980); *Dow Chemical Co. v. M/V Gulf Seas,* 593 F.2d 613, 614 (5th Cir. 1979). The Court can find no ground for denial of prejudgment interest in this case and will direct that the award will bear interest from the date of the crash to the date of entry of the judgment. *Harrison v. Flota Mercante Grancolombiana, S.A.,* 577 F.2d 968, 988 (5th Cir. 1978); *In re M/V Vulcan,* 553 F.2d 489, 490—91 (5th Cir.), *cert. denied,* 434 U.S. 855, 98 S. Ct. 175, 54 L.Ed. 2d 127 (1977).

[26] Although it would appear that the Court has the discretion to award prejudgement interest at a rate in excess of the statutory rate, *id.* at 491, it will decline the Plaintiffs' invitation to do so. The award will bear interest at the analogous Texas statutory rate, *Geotechnical Corp.*

v. Pure Oil Co., 214 F.2d 476, 478 (5th Cir. 1954), of 6% per annum[30] from the date of the injury, April 23, 1976, to the date of entry of the judgment. Naturally, the judgment will bear interest at the rate of 9% per annum[31] until paid. 28 U.S.C. § 1961.

The amount of the total judgment in favor of Mary Elizabeth Barger, individually and as personal representative of the estate of the decedent, will be $660,368.00 plus prejudgment interest. Bell is liable for 20% of this sum, or $132,073.60. PHI is liable for the remaining 80%, after crediting the amount of the aforementioned LHWCA benefits, or $501,890.68. Randy Michael Barger and Elizabeth Jane Barger are each entitled to $8,000.00 from PHI and $2,000.00 from Bell, plus prejudgment interest.

[27, 28] Neither PHI nor Bell are entitled to contribution or indemnity from the other. *Culver v. Slater Boat Co.*, 644 F.2d 460, 466 (5th Cir., 1981); *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977). In accordance with the rules set out in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1248 (5th Cir. 1979), the settlement achieved by Bell relieves it of any further liability to the Plaintiffs and PHI is liable for the entire judgment after crediting the dollar amount represented by the percentage of fault attributed to Bell. Rather than reward a defendant for its refusal to settle, no credit will be allowed to PHI for the difference between the amount of Bell's settlement and the amount

30. Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon Supp. 1980).

31. *Id.*, art. 5069-1.05.

represented by Bell's percentage of fault.[32] *Id.* at 1251.

Costs will be assessed against PHI.

The Court recognizes that today's finding that the helicopter was a vessel is a departure from the traditional concept of a vessel. The result it reaches today is no more strange than the Fifth Circuit cases holding that movible offshore drilling platforms are vessels for Jones Act purposes, while fixed platforms are not. *See, e.g., Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1348 (5th Cir. 1980).

> The absence of any legislative restriction has enabled the law to develop naturally along the development of unconventional vessels, such as the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal water of the Gulf of Mexico.

Robison, 266 F.2d at 780. Workers on movible platforms are seamen even though the rigs are jacked-out of the water and not at all vessel-like when an injury occurs. *Id.* at 772. There is, indeed, no reason for lamentations. Expansion of the law is required to adapt to

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32. Bell settled its portion of the case with the Plaintiffs immediately prior to trial for $225,000.00. Bell's part of the judgment would otherwise have been $134,073.60.

changes in our environment and in the way we live our lives, and is consistent with the humanitarian purposes of the Jones Act and other laws protecting those who encounter the hazards of the sea.

It is so ordered.

APPENDIX B

Mary E. BARGER, Plaintiff-Appellee,
Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

No. 81-2262

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1982

Rehearing and Rehearing En Banc
Denied Jan. 6, 1983

Rehearing Opinion Amended
Jan. 13, 1983.

Widow and children of helicopter pilot who died while transporting passengers to work on outer Continental Shelf sought damages in admiralty and also asserted maritime tort claims for alleged unseaworthiness of the helicopter. The United States District Court for the Eastern District of Texas at Beaumont, Joe J. Fisher, J., 514 F.Supp. 1199, sustained both claims and awarded damages. The pilot's employer appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that Outer Continental Shelf Lands Act applied to the helicopter pilot, and Longshoremen's and Harbor Workers' Compensation Act was exclusive remedy for those who had claims resulting from his death.

Reversed and remanded.

Brown, Circuit Judge, dissented and filed opinion.

Vance E. Ellefson, New Orleans, La., for defendant-appellant cross-appellee.

Charles B. Colvin, New Orleans, La., amicus, for William V. Moore.

Hubert Oxford, III, Beaumont, Tex., for plaintiff-appellee cross-appellant.

Appeals from the United States District Court for the Eastern District of Texas.

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This case raises many of the issues we decided in *Smith* v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982). We, therefore, address in detail only one issue that distinguishes this case: as to claims against a helicopter pilot's employer for the death of the pilot while transporting passengers to work on the outer Continental Shelf, is the Longshoremen's and Harbor Workers' Compensation Act the exclusive remedy? We conclude that such a pilot is not covered by the Jones Act because an aircraft is not a vessel, that the Outer Continental Shelf Lands Act applies to the pilot, and that the LHWCA is the exclusive remedy for those who have claims resulting from his death.

Walter Barger, like Walter Kolb, one of the decendents in *Smith*, was a helicopter pilot regularly engaged in transporting oil field workers and equipment from Louisiana to platforms located in the Gulf of Mexico on the outer Continental Shelf. While he was flying a helicopter

carrying eleven passengers, the helicopter crashed into the Gulf forty miles offshore, killing all aboard. Barger's widow and children seek damages in admiralty for his death from his employer, Petroleum Helicopters,[1] contending that Barger was a Jones Act seaman and also asserting maritime tort claims for the alleged unseaworthiness of the helicopter. After trial on the merits, the district court sustained both claims and awarded damages.

We held in *Smith* that the wrongful death claim of Kolb's beneficiaries against a third party, not the decedent's employer, arising from the crash of an aircraft into the high seas, is properly within admiralty jurisdiction by virtue of decisions so interpreting the Death on the High Seas Act, 46 U.S.C.A. §§ 761—768 (West 1975 & Supp. 1982) (DOHSA). *Smith*, 684 F.2d at 1108—12. The accident involved in *Smith* occurred on the outer Continental Shelf, but we decided that § 4(a) of the OCSLA, 43 U.S.C. § 1333(a) (Supp. IV 1980), making state law applicable as surrogate federal law to accidents occurring on fixed platforms, does not supersede the DOHSA so as to oust admiralty jurisdiction over the plaintiff's claim.[2]

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1. Suit was also filed against Bell Helicopter Textron, a division of Textron, Inc., the manufacturer of the helicopter. Bell and the plaintiff agreed that, if Bell were cast in judgment, Bell would pay the plaintiff $225,000 and waive any right to appeal. The district judge found Bell also liable and apportioned liability 20% to Bell and 80% to Petroleum Helicopters, 514 F.Supp. 1199. Thus, no issues relating to the plaintiffs' claims against Bell are before us.

2. *See Smith*, 684 F.2d at 1109-11. For similar reasons, we held that Petroleum Helicopters' claim for property damage arising from the same accident was likewise not ousted from admiralty jurisdiction by the OCSLA. *See id.* at 1112.

The wrongful death claim in this case, unlike the Kolb claim in *Smith,* is asserted against the decedent's employer, Petroleum Helicopter. Section 4(b) of the OCSLA provides, "[w]ith respect to . . . death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing,or transporting . . . the natual resources . . . of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. §§ 901—950 (West 1978 & Supp. 1982) (LHWCA)]." 43 U.S. C.A. § 133(b).[3] Section 933(i) of the LHWCA provides that this compensation is the exclusive remedy of an injured employee against his employer. 33 U.S.C.A. § 933(i). Therefore, if Barger was covered by 43 U.S.C. § 133(b), there can be no recovery against his employer under general maritime law. Even if admiralty jurisdiction existed because Barger's death resulted from an aircraft crash on the high seas, *see Smith,* 684 F.2d at 1109, recovery would be barred by § 933(i) and the claim would fail on the merits.

[1] The Barger plaintiffs argue that Barger was a Jones Act seaman, and therefore excluded from coverage

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3. The section continues:

> For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—
>
> (1) the term "employee" does not include a master or member of a crew of any vessel . . .;
>
> (2) the term "employer" means an employer any of whose employees are employed in [exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf].

43 U.S.C.A. § 1333(b) (West Supp. 1982).

under 43 U.S.C. § 1333(b). That section provides that the term "employee" does not include "a master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1). For the same reasons discussed in *Smith,* 684 F.2d at 1112—14, we conclude that a helicopter cannot be considered a "vessel," and, therefore, that this exclusion from LHWCA coverage does not extend to Barger.

[2] *Smith* involved several claims. Jordan, whose claim was asserted by his beneficiary (Smith), was flying a plane. Kolb and Barger were both piloting helicopters. Jordan's aircraft, like Barger's, had attachments enabling it to land on and take off from water. Kolb's helicopter apparently had no such attachment. But each of these aircraft, whether or not fitted with pontoons, was designed primarily to fly through the air not to travel on water. The dissent of our respected colleague apparently assumes that a helicopter sans pontoons used for the self-same purpose, to transport personnel to and from offshore platforms, is not a vessel. Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels. Just as a vessel does not lose its nautical quality merely because it is anchored

for a time to serve as a drilling platform, an aircraft does not become a vessel because it is adapted to float and taxi on the water for brief periods in order to perform incidental functions that aid in its primary mission. The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air. Barger did not meet death from a collision at sea or the action of the waves but as a result of an aircraft disaster. *See Symposium, Aircraft as Vessels Under the Jones Act and General Maritime Law*, 22 S.Tex. L.J. 595, 600—03 (1982).

[3] It remains only to be determined, then, whether the claim against Barger's employer is covered by the OCSLA. This depends on (1) whether Barger's death was the "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf," and (2) whether Barger's employer, Petroleum Helicopters, was an "employer" within the intendment of 43 U.S.C. § 1333 (b)(2).

The first of these conditions is clearly met. In *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982), a Chevron Oil Company employee was killed when the Chevron-owned helicopter in which he was a passenger crashed on the high seas over the Shelf. We held that the compensation act provided Stansbury's sole remedy against his employer, Chevron, because Stansbury had been inspecting work done under his supervision on a fixed rig located on the Shelf. "His work furthered the rig's operations and was in the regular course of the extractive operations on the [Shelf]. *But for those operations*, he would not have been in the helicopter. His death,

therefore, occurred 'as a result of operations' as required by the OCSLA." *Id.* at 951 (emphasis added). Barger likewise would not have been killed in a helicopter crash in the Gulf of Mexico "but for" the fact that he was employed to transport eleven workers to a fixed platform on the Shelf. His work furthered mineral exploration and development activities and was in the regular course of such activities.

With respect to the second condition for OCSLA coverage, the term "employer" means "an employer any of whose employees are employed in [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the outer Continental Shelf]." 43 U.S.C § 1333(b)(2). Unlike the employer in *Stansbury*, Barger's employer, Petroleum Helicopters, was not itself engaged in mineral operations. However, helicopter transportation of men and equipment from the mainland to the offshore rigs and back plays an important role in "developing" the Shelf. This transportation is an "operation conducted . . . for the purpose of" natural resource development. Helicopter pilots involved in these operations perform the same function with respect to resource development whether employed directly by a producer or by a separate contractor, and should not be treated differently on the basis of who their immediate employer is. We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results.[4]

Aside from the fact that this case involves an employer

4. *See generally* Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 973 (1977) ("Since the oil industry went offshore, the legal system has

and employee, the only kind of claim to which the compensation remedy applies, there is another important distinction between Barger's claim and the claim in *Smith*. The OCSLA compensation coverage provision already quoted is expansive. It extends to every injury or death "occurring as a result of operations . . . for the purpose of exploring for, developing, removing, or transporting . . . natural resources." 43 U.S.C.A. § 1333 (b). The state law extension clause, however, is considerably narrower, providing *only* for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a). Thus state law is made applicable only to workers in certain areas and not to all employees engaged in mineral development, while the compensation statute reaches any employee killed or injured while exploiting the Shelf's resources.

We, therefore, hold that Barger's exclusive remedy against his employer was LHWCA compensation.[5] The district court's judgment is REVERSED and the case

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struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos.") (footnote omitted).

5. The district court held in the alternative that, even if Barger were covered by the LHWCA, section 905(b) of that act gives a covered employee the right to bring an action against the "vessel owner" for negligence. Citing *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir. 1977), the court noted that the "circumstances that the vessel owner and the employer are the same entity does not preclude such an action." However, section 905(b) is simply irrelevant here unless a helicopter is a "vessel." We have concluded that it is not. *See* text *supra* and *Smith*, 684 F.2d at 1112-13. Therefore, workers' compensation remains Barger's sole remedy against his employer.

is REMANDED for further proceedings not inconsistent with this opinion.

JOHN R. BROWN, Circuit Judge, dissenting:

To the dual holding[1] that the helicopter was not a "vessel" and Barger, its pilot, was not a "seaman", I must respectfully dissent.

To narrow the point of difference, I wish to make clear the extensive areas in which I am in full agreement with Judge Rubin's scholarly analysis. Without a doubt, 43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) brings into play § 933(i) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which prescribes the exclusive remedy for injury and death cases by the Act. I quite agree that Barger's death was the "result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the Outer Continental Shelf . . .", 43 U.S.C. § 1333(b), and that his employer, Petroleum Helicopters, Inc., was engaged in such operations in performing the essential service of transporting men and equipment from the mainland to the offshore rigs.

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1. The dual determination was based, in effect, on the almost contemporaneous holding of the Court as to the Smith claim in *Smith v. Pan Air Corporation*, 684 F.2d 1102, 1112, n. 39 (5th Cir. 1982). Of necessity, this dissent attacks that determination. Instead of concurring specially because of a decision binding on me until altered by the Court en banc, I am dissenting, since with the filing of this dissent I will seek formally rehearing en banc, F.R.A.P. Rule 35, of the instant case which will inevitably bring into question the correctness of the *Smith* decision.

At the same time, I agree the case is not controlled by the local law of the adjacent state (Louisiana) as "surrogate" federal law under the OCSLA, 43 U.S.C. § 1333(a)(2)(A). See text accompanying n. 25, 684 F.2d at 1109. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).[2] I also agree that the Kolb claim against the third party in *Smith* for the death of a helicopter pilot in waters off the Outer Continental Shelf mas a maritime claim within the jurisdiction of the admiralty. 684 F.2d 1111—12.

And I embrace wholeheartedly the Court's conclusion that the suit by the helicopter owner in the Kolb claim of *Smith* for loss of a helicopter was within the admiralty jurisdiction. *Id.* at 1112. All of this means that for the death of Barger the Longshoremen's Act is the exclusive remedy against the employer, Petroleum Helicopters, Inc., *unless* he was ". . . a master or member of the crew of [a] vessel . . . ." 43 U.S.C. § 1333(b)(1).

This dramatizes the narrow, but significant, difference in our views. The Court having held (i) in the Kolb third party death action that the claim under DOHSA was within the admiralty and it was so maritime as to be beyond the reach of adjacent surrogate law, 43 U.S.C. § 1333(a)(2)(A); and having held (ii) in the claim for the owner's loss of the helicopter that the helicopter was engaged "in a maritime-type function, transporting

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2. The Court states:

> Unlike both Monk and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.
>
> We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties is not ousted by section 1333(a) of the OCSLA.

684 F.2d at 1111-12 (note omitted).

persons over the sea", 684 F.2d at 1111, because the aircraft was "being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, . . ." and this bore ". . . the type of significant relationship to traditional maritime activity . . . necessary to invoke admiralty jurisdiction . . .", *Id.* at 1112, the case suddenly loses its admiralty character by the interposition of the Longshoremen's Act.

It is no answer that this is what Congress has prescribed since LHWCA provides itself that seamen are excluded. The helicopter is doing what a vessel would ordinarily do—transport persons and property to and from the mainland and the offshore structure. The pilot is doing what the master and crew of a vessel would do namely, operate the craft. Each activity is maritime and maritime related. Each meets the exclusions and principles set forth in Executive *Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L.Ed.2d 454 (1972). Injury or loss to each in the OCSLA waters is within the admiralty. The factor which makes each within the admiralty is the function and purpose of the use of the craft. All that is lacking is a "vessle" in the usual traditional sense of a thing which can float on or in water to carry persons or things from one place to another.

But the normal physical characteristics to constitute an object a "vessel" have never deterred the Supreme Court or this Court from finding unusual nontraditional, odd, nonmaritime structures to be "vessels", and the person serving to fulfill the mission of such structures to be seamen under the Jones Act.

The classic case is Judge Wisdom's celebrated decision in *Offshore Co. v. Robison,* 266 F.2d 769 (5th Cir. 1959).

There, following significant Supreme Court decisions, we held an oil field "roustabout" who did not know how to, or what was meant by, the ability to "hand, reef and steer," to be a Jones Act seaman for injuries received while a floating submersible rig was made fast to the bottom of the bay by jack-up legs raising the deck of the drilling barge way above the level of the water. At the time of the injury the drilling platform was not afloat. It was hard aground. The drilling barge could not move. The only relation it had to the sea was its past—when it was towed to a new location—or, its future—when it would again be towed to another location.

Equally spectacular was the decision in *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S. Ct. 141, 100 L.Ed. 775 (1955). Gianfala and his crew members slept ashore in an oilfield camp and worked aboard a drilling barge which was resting on the bottom of the bay at the time of the injury. The Court held Gianfala to be a seaman within the scope of the Jones Act. Even more spectacular was *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S. Ct. 687, 2 L.Ed.2d 737 (1958) in which the contractor was building a "Texas tower" radar station for location in the North Atlantic to be permanently affixed to the floor of the ocean. After the tower was towed to its offshore site, Grimes did only piledriving work. He drowned when he fell out of a life ring used to carry him from a tug to the tower. The Supreme Court reversed the First Circuit and held that the "petitioner's evidence presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of the crew of any vessel" to thus circumvent the equivalent of LHWCA coverage under the Defense Bases Act. *Id.* at 253, 78 S. Ct. at 688.

Courts of Appeals and District Courts have extended *Robison* to strange sorts of things to find them to be a "vessel" and the injured person a seaman,[3] and the so called floating submersible drilling barges are in variably hard aground, incable of any movement—maritime or otherwise.[4] As a matter of physical operative fact they are just as land-bound, nonmaritime as the fixed raised drilling platform over which it is uncontradicted that none is a vessel.

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3. *Nelson v. United States,* 639 F.2d 469 (9th Cir. 1980) (a wave suppressor, an aquatic barrier erected in the water to protect boats at the Coast Guard station from heavy waves which is permanently affixed to the sea floor held to be a vessel and the decedent, a piledriver, was a seaman within the Jones Act); *Guidry v. South Louisiana Contractors,* 614 F.2d 447 (5th Cir. 1980) (elevated boom of a large dragline was a vessel; case remanded for jury determination whether injured party was Jones Act seaman); *Hicks v. Ocean Drilling & Exploration Co.,* 512 F.2d 817 (5th Cir. 1975) (submersible oil storage facility resting on the bottom of the Gulf held to be a vessel and plaintiff a seaman); *Brinegar v. San Ore Construction Co., Inc.,* 302 F.Supp. 630 (E.D. Ark. 1969) (fuel tank pontoon vessel capsized at time of accident held to be a vessel and plaintiff a Jones Act seaman).

4. Submersible drilling barge cases are legion and invariably involve injuries occurring while the drilling barge is fixed on the ocean floor and not floating or in movement. *See Daughdrill v. Diamond M. Drilling Co.,* 447 F.2d 781 (5th Cir. 1971); *Neill v. Diamond M. Drilling Co.,* 426 F.2d 487 (5th Cir. 1970); *Producers Drilling Co. v. Gray,* 361 F.2d 432 (5th Cir. 1966); *Harney v. William M. Moore Building Corp.,* 359 F.2d 649 (2d Cir. 1966); *Clary v. Ocean Drilling and Exploration Co.,* 429 F.Supp. 905 (W.D. La. 1977); *McNeese v. An Son Corp.,* 334 F.Supp. 290 (S.D. Miss. 1971); *McCarty v. Services Contracting Inc.,* 317 F.Supp. 629 (E.D. La.); *Robichaux v. Kerr McGee Oil Industries, Inc.,* 317 F.Supp. 587 (W.D. La. 1970); *Rogers v. Gracey-Hellums Corp.,* 331 F.Supp. 1287 (E.D. La. 1970); *Hebert v. California Oil Co.,* 280 F.Supp. 754 (W.D. La. 1967); *Ledet v. U.S. Oil of Louisiana, Inc.,* 237 F.Supp. 183 (E.D. La. 1964); *Oliver v. Ocean Drilling &*

The upshot of these decisions for our case is that because the helicopter was regularly operated in the transportation of persons and property to and from the mainland and the offshore structures, it was engaged in maritime activities so that the loss of the helicopter and the death of the pilot were a maritime tort within the jurisdiction of the admiralty. It is maritime because of the nature of the work it regularly performed—the transportation of persons and property. This is made positive by the Court's treatment of the pilot's (*Kolb's*) claim. The Court emphasized that "his duties constantly carried him back and forth above the high seas over the outer Continental Shelf." 684 F.2d at 1111. Disregarding the relationship of the death claim to the OCSLA and the acknowledged seperate jurisdiction under DOSHA, the Court went on:

> Even apart from this 'special treatment' accorded airplane crash victims, there would still be admiralty jurisdiction over Kolb's accident, as we show below in regard to Petroleum Helicopters' property claim arising from the same accident. *See* Part IIC *infra*.

Id. And after stating in Part IIC that the "logic of *Executive Jet* appears to require extension of admiralty jurisdiction to non-death claims arising on the high seas if the aircraft flight has the essential maritime nexus," *Id.* at 1112, the Court eliminating the "if", concluded:

> Therefore, both the locality and maritime nexus requirements being met, we hold that the *Petroleum Helicopters* claim, like the *Kolb* death claim, may be brought in admiralty. *Id.*

To the Court's *quaere, Id.* at 1113, n. 41, the record in this case and the trial court's factual findings clearly reflect that the amphibious helicopter here comes within

the broad, virtually indefinable *Robison* definition of a special purpose craft.[5] The judge found that this amphibious helicopter was specially designed and built not only to take off and land on water but also to taxi on the water. It could move under it self-propulsion on the water to position itself for the loading or unloading of cargo or passengers. He characterized the craft as one designed to function as a crew boat without which the gigantic offshore oil industry's maritime operations, *see Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir., 1982) (en banc), could not function. Indeed this seems to have been the sole function of this helicopter.[6]

More than that the helicopter literally met the Congressional definition that "any artificial contrivance . . . capable of being used, as a means of transportation on water" constitutes a vessel.[7] 684 F.2d at 1113, n. 40.

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5. It must be emphasized that a *Robison* vessel determination does not necessarily or automatically mean Jones Act status, so the question is broader than: "Is the injured worker a Jones Act seaman?" *See Dugas v. Pelican Construction, Co.*, 481 F.2d 773 (5th Cir. 1973) (not a Jones Act seaman but entitled to seaman's warranty of seaworthiness).

6. The Supreme Court in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 619, n. 2, 98 S. Ct. 2010, 2011, n. 2, 56 L.Ed.2d 581, 583, n. 2, said "[t]he District Court bottomed admiralty jurisdiction on a finding that the helicopter was the functional equivalent of a crewboat. The ruling has not been challenged in this Court." (citation omitted).

7. Since we are dealing directly with the usage of not only the LHWCA but also more recently the 1953 OCSLA, 43 U.S.C. § 1333 (c)(1) as amended September 18, 1978, 43 U.S.C. § 1333(b)(1), the Court's explanation, 684 F.2d at 1113, n. 40, not only ignores these historical facts (plus the substantial 1972 amendments to the LHWCA) but also this Court's express conclusion that we must determine what Congress meant about a matter on which it could not have thought because of technological non-existence. For ex-

Whatever the meaning of the full text of 49 U.S.C. § 1509(a) rather than the Court's paraphrase of it, 684 F.2d at 1113, the fact is that in very recent actions Congress has definitely included seaplans (including helicopters) within the meaning of the term "vessel". In the major overhaul of the International Regulations for Preventing Collisions at Sea, 33 U.S.C. § 1601 *et seq.* (1977), the Congress in 1977 did several significant things. It repealed the long standing "Rules of the Road." It provided for a proclamation by the President and the promulgation of the International Regulations for Preventing Collisions at Sea (International Rules).[8]

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ample, discussing the technological advances made since Congress enacted COGSA, this Court has stated:

> Our principal task in this case is to determine what Congress would have thought about a subject about which it never thought or could have thought and one about which we have never thought nor any other Court has thought. Technology has created a maritime transportation system unlike any which was in existence in 1936 when Congress enacted COGSA. (note omitted).

Wirth Ltd. v. S/S ACADIA FOREST and LASH Barge, 537 F.2d 1272, 1276 (5th Cir. 1976).

The question remains then, what did Congress mean in 1953 when it enacted § 4(b)(1) of the OCSLA, the statute which cuts off the maritime claim for the death of the pilot. *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970).

8. The International Rules, *see* 33 U.S.C. § 1602 number 1 through 38.

Rule 3(a) states that:

> (a) The word 'vessel' includes every description of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water.

Rule 3(e) states that:

> (e) The word 'seaplane' includes any aircraft designed to manoeuvre on the water.

Rule 31 reflects peculiar concern with seagoing aircraft:

> Where it is impracticable for a seaplane to exhibit lights and shapes of the characteristics or in the positions prescribed in

33 U.S.C. § 1601(1) leaves no doubt that all kinds of seagoing aircraft are included within the term "vessel." It states:

> 'vessel' means every description of watercraft, including nondisplacement craft and seaplanes used or capable of being used as a means of transportation on water. . . .

A helicopter comes within the statutory definition of a "nondisplacement craft" and certainly fits the qualification of a craft "used or capable of being used as a means of transportation on water." Id. As a statutorily defined "vessel", a helicopter is also subject to the elaborate system set up in 33 U.S.C. § 1608 for civil penalties. There, investigative, enforcement and comprehensive measures are provided, including liability of an operator of a vessel and an *in rem* remedy against the craft.

Whatever Congress had or could have had in mind regarding the term "vessel" in 1920 when it first enacted the Jones Act, it is now clear in 1982 and has been ever since 1977 that Congress has no doubts. Congress means to include any and all kinds of seagoing aircraft within the term "vessel", with the sole qualification that the craft be used or *capable of being used* for transportation on or over international waters, which these clearly were, or other waters over which the United States has jurisdiction.

One final note on the term "vessel". The Court stresses that in *Robison* we were concerned with "special purpose

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the Rules of this Part *she* shall exhibit lights and shapes as closely similar in characteristics and position as is possible. (emphasis supplied).

structures" which are designed to float and be towed "across water to the drilling site despite their incapacity for *self-propulsion*." 684 F.2d at 1113. Wave barriers permanently affixed to the sea floor, *Nelson*, 639 F.2d 469, the elevated boom of a dragline, *Guidry*, 614 F.2d 447, and a submersible oil storage facility, *Hicks*, 512 F.2d 817, and the "Texas Tower" for radar defense of the nation, *Grimes*, 356 U.S. 252, 78 S. Ct. 687, 2 L.Ed.2d 737, hardly fit that category.

Nor does fidelity to the principles of *Robison* require that the flexible maritime law's concern for those who go down to sea, *see Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed.2d 9 1974) (following *Moragne*)—whether in ships or today's version of the ship's equivalent—should be denied effectuation of the admiralty remedy which Kolb and all other helicopter pilots, including Barger, have, because the thing—the helicopter—whose used for substantial maritime purposes gives the controversy the prized characterization of a maritime claim, is not a vessel[9]

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9. That ascribing vessel status to a helicopter leaves some legal problems unanswered, *see* 684 F.2d at 1114 (limitation of liability, etc.), is no deterrence to the admiralty's adaptability. Recall, for example, that in the boundless *Sieracki* claims, founded on traditional seamen's work, longshoremen never received maintenance and cure. *Seas Shipping v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099 (1946).

Mary E. BARGER, Plaintiff-Appellee,
Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

No. 81-2262

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1982

Rehearing and Rehearing En Banc
Denied Jan. 6, 1983

Rehearing Opinion Amended
Jan. 13, 1983.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Before BROWN, RUBIN and REAVLEY,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge, with whom POLITZ and JOHNSON, Circuit Judges, join, dissenting:

For the reasons set forth in my dissent to the panel opinion, I dissent to the failure of the Court to grant rehearing en banc.

TATE, Circuit Judge, dissenting from denial of Suggestion for Rehearing En Banc:

I join Judge Brown in dissenting from the denial of the application for en banc rehearing. Without definitely concluding now that I would reach the conclusions expressed by Judge Brown in his dissent to the panel opinion, I feel that they raise concerns of sufficient import to warrant full consideration by the entire Court on this issue of everyday importance to workers servicing our offshore oil industry.

APPENDIX C

NO. 82—1632.

Mary E. Barger, Petitioner

v.

Petroleum Helicopters, Inc.

461 U.S. 958, 77 L.Ed.2d 1316, 103 S. Ct. 2430.

May 31, 1983, Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Same case below, 692 F.2d 337.

APPENDIX D

CASE NO. 87-LHC-597

OWCP NO. 7-39001

In the Matter of:
WALTER BARGER, DECEASED[1]
Claimant

v.

PETROLEUM HELICOPTERS, INC.
Employer

and

AMERICAN HOME ASSURANCE COMPANY
Carrier

Mary Ellen Blade, Esq.
For the Claimant

Douglas B. Habig, Esq.
For the Employer

Before: JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER — GRANTING BENEFITS

This proceeding arises out of a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). After proper notice a hearing was held in Beau-

1. I have titled this matter Walter Barger, deceased, claimant, since the matter has consistently been so titled. However, the matter was, in fact, brought by Mary E. Barger, widow, who is the Claimant and is so referred to in my decision.

mont, Texas on June 17, 1987. Both parties were represented by counsel and afforded a full opportunity to be heard, to produce relevant evidence, to call, examine and cross-examine witnesses, to submit oral and written arguments, and to fully litigate the matter. My Decision and Order is based upon the entire record.

Statement of the Case

The facts of this matter are not in dispute. In the early morning of April 23, 1976, the helicopter piloted by Walter Barger, malfunctioned and crashed into the Gulf of Mexico killing Mr. Barger and the eleven passengers on board who were being ferried to a drilling platform. Employer, Petroleum Helicopters, Inc. (PHI) is in the business of transporting workers to and from drilling platforms in, among other places the Gulf of Mexico, off the coast of Texas and Louisiana.

PHI and its compensation carrier made voluntary payments to claimant under the Act from the date of accident (E # 3, 5) until Claimant filed an action under the Jones Act on April 17, 1978 against both PHI and Bell Helicopters, Division of Textron, Inc. (the company that manufactured the helicopter in which Mr. Barger died) under a product liability tort action.

On May 21, 1981, Judge Joe J. Fisher, Unitde States District Court, Beaumont Division, rendered a Decision and Order holding that both PHI under the Jones Act and Bell were liable to the Claimant in the total amount of $660,368.00 (plus $10,000.00 each to her two children) to be apportioned 80% to 20% respectively, based on degree of fault. (*Barger v. Petroleum Helicopters, Inc.*, 514 F. Supp. 1199 (1981). This opinion was appealed

to the United States Court of Appeals, Fifth Circuit, which in an opinion of November 10, 1982 (692 F.2d 337) revresed and remanded Judge Fisher's decision, finding that since the helicopter could not be considered a "vessel," the exclusive remedy for claims resulting from Mr. Barger's death was the Longshoremen's and Harbor Workers' Compensation Act.[2] In a decision on appeal regarding American Home Assurance Company, the Fifth Circuit, July 9, 1984, described their judgment as follows: "On appeal, we reversed the judgment against PHI under the Jones Act and remanded the matter for entry of an appropriate judgment against Bell Helicopters under the terms of its settlement agreement."

On August 19, 1983, Judge Fisher entered judgment in accordance with the Fifth Circuit Court of Appeals opinion and pleadings filed in the case which dismissed the claims against PHI under the Jones Act, since the exclusive remedy was under the LHWCA. Judge Fisher further found that the helicopter was "defective and unreasonably dangerous within the meaning of § 402(a)

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2. Judge Brown, dissented, contending the helicopter is doing what a vessel would ordinarily do transport persons and property to and from the mainland and the offshore structure, the pilot was doing what the master of a vessel would do, operate the craft, and the activity is maritime (pp. 342). The majority stated (pp. 339).

> "Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels."

of the *Restatement 2nd of Torts* and that such defective design was a producing cause of the crash . . . The Court therefore finds in favor of Plaintiffs against Defendant Bell Helicopter Company."

Judge Fisher in his judgment went on to refer to an agreement entered into between Claimant and Bell (which is at the heart of the case before me) stating: "Bell . . . entered into an agreement in which Plaintiff's claims would be compromised if a finding of liability were made against Bell . . . , and the claims of Plaintiff having been compromised and settled subsequent to the trial of this cause, the claims of Plaintiffs against Bell . . . are hereby dismissed."

This agreement was signed at 11:00 p.m. September 9, 1980 on the eve of the trial in the District Court. (E # 6, T-853).[3] However, while the final general terms of the agreement were affirmed in an affidavit by the then attorney for Bell not to have been established until July 19, 1980 (C # 2), it is clear that through their respective counsel, claimant had informed PHI of negotiations she was having with Bell as early as July 10, 1978 (E # 9). Moreover, on August 17, 1978, Claimant informed PHI that the terms of the settlement would net to PHI (through offset) $125,000-150,000 depending on the amount of attorney fees allowed. Claimant urged PHI to join in the settlement which would not be effected

3. Accompanying Employer's post-hearing brief were Employer's exhibits 3-12 and a motion to admit the documents; Claimant's counsel submitted exhibits 1 and 2 accompanying her post-hearing brief. These exhibits are all received into evidence over any objections. Many of the documents are necessary for determination of the issues involved and though not specifically requested by me at the hearing would have been requested by me before making a final determination. (See, also, T-30-34).

without PHI's approval. Claimant in this letter, also, protested the cutoff of payments under LHCWA by PHI "due to some settlement." (D # 10).

Issues

The sole primary issue is whether Claimant's agreement with Bell bars her from receiving payments under the LHWCA pursuant to Section § 933 (g). Assuming a negative answer, Employer, in particular, raises issues concerning computation of payments and offsets that are discussed separately below.

Conclusions

Section 33 (g) of the Act provides that, in certain situations, the failure of a claimant to obtain the approval of the employer and carrier prior to settling a third-party suit for an amount less than the compensation owed by the employer bars the claim for compensation. Section 33(g) was amended, effective September 28, 1984, by the 1984 Amendments to the Act. Under the terms of Public Law 98-426, 98 Stat. 1639, the "Longshore and Harbor Workers' Compensation Act Amendments of 1984," the amendment to § 33 (g) went into effect immediatly upon enactment and applied both to pending and future claims.

Section 28(a) of Public Law 98-426 states that, "[e]xcept as otherwise provided in this section," the 1984 Amendments are effective on the date of enactment and apply to all pending and future claims. The amendments to § 33(g) of the Act, which were made in § 21(d)

of P. L. 98-426, are not listed as an exception to the general effective date.

Although the parties involved herein have contested legal issues under the Jones Act in federal courts in the 5th Circuit, the matter has not been litigated prior to this hearing under the LHWCA. Clearly, therefore, the 1984 amendments apply. (See, also, *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986).

As amended in 1984, § 33(g) states in pertinent part as follows:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), *or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person,* all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act. (Emphasis added)

Employer contends that the ruling in *Petroleum Helicopters, Inc., et al v. Collier,* 18 BRBS 67 (CRT) (March 10, 1986), Fifth Circuit is controlling. The court in *Collier* stated (pp. 72): "§ 933 (g)(1) is brutally direct: "The employer shall be liable for compensation . . . *only* if written approval of the settlement is obtained from the employer and the employer's carrier "(emphasis added). "Although the court goes on to state that the language in § 933 (g)(1) is "reiterated in § 933 (g)(2), so that the two provisions frame an unmistakable scheme . . .", the court throughout its decision in all other instances refers to Section 33 (g)(1). In that connection in *Collier,* the Employer *paid* compensation under the Act up until the time of settlement by claimant with a third party. Claimant was thus a "person entitled to compensation" under the Act. However, the court did not address the situation where benefits were not being paid. The distinction is made clear by the Benefits Review Board in the case of *Dorsey v. Cooper Stevedoring, supra,* where it was stated:

"The purposes of Section 33(g) are to ensure that employer's rights are protected in a third party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. § 933(b)-(f). *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80, 82 (1985).

The legislative history indicates that the 1972 amendments were intended to overrule case law applying estoppel, substantial compliance, and similar theories to avoid the effect of non-compliance with Section 33 (g), and to make clear precisely what type of written approval the person entitled to benefits must obtain to comply with Section 33(g). S. REP. NO. 1125, 92d Cong., 2d Sess.

14 (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. 12 (1972).

Subsequent to the 1972 Amendments, the Board in O'Leary, supra, restricted the application of Section 33(g). The Board interpreted the language "person entitled to compensation" as indicating that Section 33 (g) bars compensation only when employer is actually paying compensation either pursuant to an award or voluntarily when claimant enters into a third party settlement. *See also Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982) (Ramsey, C.J., concurring in result), *aff'd* mem. 729 F.2d 757 (5th Cir. 1984); *Caranante v. International Terminal Operating Co.*, 7 BRBS 248 (1977). The Board recognized in O'Leary that if this requirement were imposed, claimant would be placed in an unfair position. If claimant were injured through the negligence of a third party and employer contested entitlement to benefits under the Act, claimant would be forced to sue the third party. Even if claimant, however, obtained a reasonable offer, employer could refuse to give its consent to the third party settlement while continuing to contest the compensation claim. As a result, claimant would not receive any compensation. Ultimately, claimant might be forced into a settlement without employer's consent in order to obtain money. The Board concluded that by requiring written consent, Congress could not have contemplated such a result. *O'Leary*, 7 BRBS at 149.

Employer contends that the phrase "regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act," inserted at the end of subsection 33(g)(2),

overrules *O'Leary,* and that compensation is therefore barred in this case regardless of the timing of the settlement. We reject this contention. We do not view this new phrase in subsection 33 (g)(2) as modifying the written approval requirement of subsection 33(g)(1). Rather, we view subsections 33 (g)(1) and 33 (g)(2) of the amended Act as separate provisions applicable to separate situations.

Under subsection 33 (g)(1), the employer's written approval of a settlement must be obtained where employer is paying compensation as stated in *O'Leary*. Under subsection 33(g)(2), regardless of whether employer has made payments or acknowledged entitlement (*i.e.,* where *O'Leary* does not apply), the employer must at a minimum be given notice of a settlement; written approval is *not required.* Thus, the statute as interpreted in *O'Leary* is re-enacted in subsection 33(g)(1), and an additional notice requirement in cases where the claimant is not "entitled to compensation" under subsection 33(g)(1) is enacted in subsection 33(g)(2).

Several reasons support this interpretation. First, the legislative history of the 1984 Amendments indicates no congressional intent to overrule *O'Leary*. The legislative history in fact contains nothing conclusive regarding the changes to Section 33(g). By contrast, the legislative history does expressly identify several cases dealing with other provisions of the Act with Congress overruled by amending the Act. *See, e.g.,* H.R. REP. NO. 1027, 98th Cong., 2dSess. at 30 (1984), and CONG. REC. § 11625 (daily ed. Sept. 20, 1984) (statement of Sen. Hatch) (overruling *Aduddell v. Owens-Corning Fiberglass,* 16 BRBS 131 (1984); H.R. Rep. NO. 1027, 98th

Cong. 2d Sess. at 29-30 (1984) and CONG. REC. H9730-31 (daily ed. September 18, 1984) (statement of Rep. Miller) (overruling *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981)).

Finally, our conclusion that claimant need obtain written approval of a third party settlement only when he is "entitled to compensaation" is consistent with policy concerns. The Act should be construed in order to further its purpose of compensating longshoremen and harbor workers "and in a way which avoids harsh and incongrous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Northeast Marine Treminal Co., Inc. v. Caputo*, 432 U.S. 249, 268 (1977). If Section 33(g) were applied as employer argues, the result would be harsh and unfair. There would be no means to protect claimant against the withholding of consent by employer or its insurer in a meritorious case. In any case in which a settlement was entered into for an amount less than the compensation to which claimant would be entitled under the Act, employer would only need to withhold its written approval of the settlement thereby avoiding the payment of compensation under the Act. The purpose of Section 33(g) can be satisfied by the less restrictive approach adopted in this opinion. *See Devine v. National Creative Growth, Inc.*, 16 BRBS 147, 154 (1982) (opinion of Ramsey, C.J., dissenting).

In conclusion, under the amended Section 33(g), a claimant must, in order to preserve his or her right to compensation (1) obtain written approval of a third party settlement if at the time of settlement claimant is "entitled to compensation" under an award or because of voluntary payments, or (2) give notice of the third party settlement (or judgment) in all other cases."

This conclusion has also been reached by Administrative Law Judge Parlen L. McKenna, who has well articulated his reasons for distinguishing his case from *Collier* in *Court v. Nichlos Drilling, et al,* 19 BRBS 457 (ALJ) (November 25, 1986). by Judge Thomas Schneider, in *Wilson v. Triple A. Machine Shop, et al,* 83-LHC-3337 (August 15, 1987), and by Judge Jeffrey Turek, *Caroline Cernousek v. Braswell Shipyards, Inc. et al,* 86-LHC-564 (1985). Moreover, in all cases cited in *Dorsey, Cowart* as well as other cases researched where a distinction has been made between where a claimant has been receiving compensation under the Act and where payments have not been made the same result has been reached.[4] The Fifth Circuit Court's failure to speak to this distinction is further emphasized by their earlier decision in *Peters v. North River Insurance, et al,* 76 F.2d, (June 27, 1985).

The Court in *Peters* noted the Act: . . . "furthered the objectives of (1) preserving a compensated worker's remedies against third parties; (2) allowing the employer in certain circumstances to assert the worker's rights against third parties when the worker has failed to do so; (3) denying third parties a right of contribution or indemnity from the employer even when the employer is at fault; (4) allowing the employer to recoup from third-party recoveries the benefits paid to the worker even if the employer is at fault; and (5) preserving the employer's right to assert its own independent cause of action against third parties for recovery of the compensation benefits to the worker." (pp. 310). The Court

4. In *Melrose Mikell v. The Celotex Corporation, U.S. District Court, Southern District of Georgia* (January 31, 1985) plaintiff was barred from reopening a LHWCA case due to a 3rd party settlement because *notice* was *not* given Employer.

concludes . ". . . a worker who has asserted an unassigned third-party claim cannot settle that claim independently of the worker's right to a credit towards compensation benefits that will accrue in the future. When the worker brings a third-party suit, the Act expressly provides that the employer shall receive a credit, to the extent of the worker's recovery, on benefits that will accrue in the future." (pp. 319).

I conclude that the *dicta in* both Collins and *Peters* by the Fifth Circuit Court concerning the mandatory reqquirement of Employer's signing third party settlements is not binding, particularly since neither case focused on the meaning of why only "notice" was an alternative requirement added by the 1984 Amendments under § 933 (g)(2), and since the two cases dealt with voluntary payments were being made at the time of settlement and the main issue was the subrogation rights or entitlement to compensation setoffs by the third party settlement. The results would support my conclusion.

Further the facts of this case strongly dictate the conclusion reached in *Dorsey*. While Claimant *was* voluntarily paid under the Act by Claimant, her pursuit of a claim under the Jones Act for even higher compensation was not spurious, and was, in fact, initially successful, resulting in Judge Fisher's judgment in the total amount of $660,368.00 (in addition to $20,000.00 for the two children). Moreover, PHI was fully apprised of the actions being taken, particularly negotiations with Bell which would benefit PHI, and was consistently urged to join in the settlement.

While the reasons for PHI not joining in the action

against Bell or the settlement, are not clear,[5] the resultant "judgment" in favor of Claimant against Bell is of great savings to PHI. At the time of settlement, Claimant apparently was receiving no compensation. Despite the fact that Claimant may be considered at least partially to blame for the cutoff of funds by PHI by pursuing an action against PHI under the Jones Act (a mutually exclusive remedy as against PHI), PHI was in a position of reaping all the benefits of subrogation of a claim pursued by Claimant while taking few risks and *not* paying benefits under the Act even though acknowledging liability. Such a result is not in keeping with the general purposes of the Act. *Voris v. Eikel,* 346 U.S. 328, (1983).

I further find support for the view that Sec. 33(g)(2) requires only notice rather than signing when Claimant is not being paid by employer under the Act by the language of amended Section 33(b). This section provides Employer the opportunity to pursue actions a claimant may have against a third party in its own right. Thus Employer may aggressively pursue action against an allegedly negligent third party and directly receive compensation, or passively permit Claimant to pursue a 3rd party action, reaping the benefits of either a judgment in favor of Claimant or a settlement by Claimant in the nature of a setoff of compensation owed by Employer under the Act. However, if Employer chooses to waive his right to pursue the third party action, he cannot complain because the settlement reached by Claimant

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5. It is not an illogical conclusion that PHI was unhappy that it was pursued under the Jones Act for higher compensation by Claimant under an unprecedented theory that a helicopter was a vessel. A successful conclusion of this suit would cause PHI increased future exposure, and undoubtedly higher insurance premiums. (E#7).

against the third party is not to its liking.[6]

In reaching my conclusions it is unnecessary to determine the issue raised by both parties as to whether or not the document in question was an agreement effective upon upon judgment rendered on the merits, as contended by Claimant or a compromise or settlement as envisioned under the Act.

Further I reject Employer's arguments that the settlement was prejudicial to Employer since it" . . . would be entitled to a credit of $660,368.00 less expenses and attorney's fees. See *Barger v. PHI, supra* 514 F. Supp. at 1212. By all legal authority, Bell would have been cast in judgment for the full amount of damages upon the determination by the Fifth Circuit that PHI was exempt as an LHWCA employer. "(Post hearing brief, p. 9). Employer sights no "legal authority." I find Employer's argument curious, since in his initial determination, Judge Fisher found 80% of the negligence that caused the death of Claimant's husband attributable to PHI. In fact the settlement of $225,000. (Net $145,-223.00) is in excess of the $132,073.60 awarded by Judge Fisher against Bell in his initial determination. Further any rights Employer had to receive additional compensation against Bell should have been litigated by PHI in the District Court rather than under the Act,[7] (See, *Federal Marine Terminals, Inc. v. Burnside*

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6. While the language of amended 33(g)(1) and (2) and 33(b) is not absolutely clear and does not cover all circumstances, the purpose behind the section is clearly to provide a balance between rights of Employer and Claimant against a 3rd party as stated in *Peters, supra*. In cases such as this one at issue, the future rulings may emphasize that approval of settlements by Employer may not be *unreasonably* withhold when proper notice is given.

7 In *Peters, supra* the court stated that the Act and regulations envision formal compensation awards as a matter of course only

Shipping Co., 394 U.S. 404 89 S. Ct. 1144 (1969).

I, also, reject Employer's contention that claimant was not a "person entitled to compensation" under section 33(g) since PHI had virtually made payment voluntarily under the Act, never controverted claimant's right to benefits under the Act, but rather jurisdiction was contested by Claimant. While factually correct, the crucial fact is that Claimant was not being compensated at time of settlement. Claimant's financial condition is not aided by Employer's mere assertion that she is entitled to benefits if in fact Employer is not paying them. Employer's present controversion is no less real because he originally acknowledged liability under the Act.

Amortization and Set-Off

Employer/carrier contends that if it is liable for compensation under the Act, the settlement agreement with Bell provided interest would accrue at the rate of 9% from August 1, 1979 until settlement funds were paid within 10 days of judgment, May 21, 1981. Employer calculates this amount at $37,125.00. Employer, also, contends it has not been afforded credit for the amounts voluntarily paid in the total amount of $26,403.72. Claimant alleges neither matter was brought up before the Deputy Commissioner and, therefore, cannot be raised here. Additionally, the $26,403.72 has been disallowed by the District and Appeals courts.

Calculation of payments is the province of the Deputy

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in those cases in which there is dispute between a worker and employer. Employer may upon request cause entry of compensation award, though he does not contest his liability under the Act, solely for purpose of triggering the six-month period during which worker must assert a third-party claim or lose that right to employer for a temporary period (headnote 3).

Commissioner. On the record before me the net amount of the settlement paid by Bell to Claimant was $145,-223.00. I must presume that the interest amount of $37,-125.00. was included in such net value absent evidence to the contrary. At any rate, Employer's right to off-set is based on the amount actually paid Claimant; sums owed by Bell to Claimant and not paid are not a part of this case. On the other hand, should the additional amount of $37,125.00 have been paid by Bell and not credited by the Deputy Commissioner in computing his amortization of the set-offs, such amount should be re-computed.

Similarly, Employer/carrier should be credited for voluntary payments totalling $26,403.72 which are separate and apart from the Bell-Claimant settlement-judgment. Amortization of the set-off should commence with the suspension of these voluntary payments. This issue was not raised at the Deputy Commissioner level or at the hearing; evidence was submitted post-hearing by Employer without opportunity for objection or rebuttal.

Both of these contentions, therefore, shall be determined computed or recomputed by the Deputy Commissioner.

Attorney Fees

Claimant's counsel's firm received some $80,000.00 in connection with claimant's case against Bell. In the case at hand, the record indicates PHI voluntarily agreed to pay death benefits as provided under the Act which were suspended precisely because Claimant filed for additional compensation under the Jones Act. Claimant has received no additional benefits under the Act from

what she would have received had this voluntary payment remained undisturbed. Therefore, counsel is not entitled to additional legal fees.

ORDER

1. PHI shall pay Claimant for death benefits as is provided for under the Act, less the net amounts paid by Bell Helicoptres under a 3rd party settlement-judgment, giving credit to PHI's voluntary payments, and including interest from date due.

2. All computations; verifications and recomputations shall be made by the Deputy Commissioner.

/s/ JOHN C. HOLMES

John C. Holmes

Administrative Law Judge

Date Issued: Nov. 18, 1987

APPENDIX E

BRB NO. 88-101

MARY E. BARGER
(Widow of WALTER BARGER)
Claimant-Respondent

v.

PETROLEUM HELICOPTERS, INCORPORATED

and

AMERICAN HOME ASSURANCE COMPANY
Employer/Carrier-Petitioners

(Filed As Part Of The Record, Nov. 22, 1989)

DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Mary Ellen Blade (Benckenstein, Oxford, Radford & Johnson), Beaumont, Texas, for claimant.

Vance E. Ellefson and T. Justin Simpson (Larzelere, Ellefson & Pulver), Metairie, Louisiana, for employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, DOLDER, Administrative Appeals Judge, and AMERY, Administrative Law Judge.*

PER CURIAM:

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. § 921(b)(5) (Supp. V 1987).

Employer appeals the Decision and Order (87-LHC-597) of Administrative Law Judge John C. Holmes awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (the Act). The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The deceased employee was a helicopter pilot who transported workers to drilling platforms in the Gulf of Mexico. He was killed on April 23, 1976, when a helicopter he was piloting malfunctioned and crashed. Employer made voluntary payments under the Act from the date of the accident until April 17, 1978, when claimant, the deceased employee's widow, filed an action against employer under the Jones Act. In the same suit, claimant filed an action under strict liability and negligence against Bell Helicopters, the manufacturer of the helicopter in which the decease demployee died. On September 9, 1980, prior to the entry of judgment, claimant executed an agreement with Bell Helicopters which provided that if judgment were entered against the company for any amount, Bell would pay claimant the gross amount of $225,000 and not pursue an appeal.

The trial court found that the deceased employee was a seaman and awarded claimant $660,368 (plus $10,000 each to claimant's two children). *Barger v. Petroleum Helicopters, Inc.*, 514 F. Supp. 1199 (E.D. Tex. 1981).

The court found employer liable for 80 percent of the judgment and Bell liable for 20 percent, although the latter was relieved of liability due to the agreement. *Id.* at 1212. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the finding that the deceased employee was a seaman and held that claimant's sole remedy against employer was under the Longshore Act as extended by the Outer Continental Shelf Lands Act. *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982).

In the subsequent claim for benefits under the Act, employer argued that claimant was barred from receiving benefits by Section 33(g), 33 U.S.C. § 933(g), because it had not given its written approval of the agreement with Bell. Claimant responded that the agreement with Bell was not a settlement within the meaning of Section 33(g) and, alternatively, that because she was not a "person entitled to compensation" at the time of the settlement, she was not barred from receiving benefits. The administrative law judge found that claimant was not a "person entitled to compensation" and awarded death benefits, 33 U.S.C. § 909. He declined to determine whether the agreement was a settlement within the meaning of Section 33(g). Employer appeals, arguing that the administrative law judge's Section 33(g) determination and award of benefits should be reversed. Claimant responds, urging affirmance.

Prior to the 1984 Amendments, the Board held that a claimant was a "person entitled to compensation" within the meaning of Section 33(g), 33 U.S.C. § 933(g) (1982) (amended 1984), if employer was paying benefits either voluntarily or pursuant to an award at the time of the third-party settlement. *See O'Leary v. South-*

east Stevedoring Co., 7 BRBS 144 (1977), *aff'd mem.*, 622 F.2d 595 (9th Cir. 1980). If claimant was not receiving benefits, the requirement of Section 33(g) that claimant obtain written approval of third-party settlements did not apply. *See Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984). Pre-1984 Section 33(g) became Section 33(g)(1) in 1984. At that time, Congress added Section 33(g)(2), which provides:

> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a htird person, all rights to acompensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

33 U.S.C. § 933(g)(2) (Supp. V 1987). In *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986), the Board addressed the effect of the addition of Section 33(g)(2) on claimants who were not receiving any benefits at the time of third-party settlement. This section clearly applies regardless of whether employer has made any payments to claimant. However, it applies if no written approval is obtained as discussed in subsection (g)(1) or if the employee fails to notify the employer of any settlement or judgment in a third-party action. In order to give effect to all parts of the statute, the Board in *Dorsey* held that where claimant is not a "person entitled to compensation," he is required to either obtain written approval or notify employer of the third-party settlement. 18 BRBS at 31. *See also Chavez v. Todd Shipyards*

Corp., 21 BRBS 272, 275 (1988); *Mobley v. Bethlehem Steel Corp.*, 20 BRBS 239, 242-243 (1988). This construction of the statute protects employer's Section 33(f) lien interest by requiring that claimant, at a minimum, provide employer with notice of any settlement or judgment. *See Mobley*, 20 BRBS at 244.

We reject employer's argument that *Petroleum Helicopters, Inc. v. Collier*, 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), rev'g 17 BRBS 80 (1985), controls the instant case. As employer contends, the court's opinion contains language to the effect that there is no exception to the written approval requirement of Section 33(g)(1). 784 F.2d at 647. 18 BRBS at 72 (CRT). The court in *Collier*, however, did not address the case where claimant is not a "person entitled to compensation" or the notice provision of Section 33(g)(2). Thus, *Collier* is distinguishable from the instant case. *See Cowart v. Nicklos Drilling Co.*, BRBS, BRB No. 87-330 (Oct. 31, 1989).

We also reject employer's argument that the instant case is "distinguishable from *O'Leary* and its progeny" because claimant "controverted her own entitlement to compensation under the Act" by filing a Jones Act claim. Contrary to employer's suggestion, it was not required to stop paying Longshore benefits when claimant filed her Jones Act claim. If employer had continued paying Longshore benefits and claimant had been found to be entitled to recovery under the Jones Act, employer would have been able to recover or receive a credit for the Longshore benefits. *See Miller v. Rowan Companies*, 815 F.2d 1021, 1028 (5th Cir. 1987).

Since the only fact relevant to the question of whether claimant was a "person entitled to compensation" is that

she was not receiving benefits at the time of the agreement, *see Pinell v. Patterson Service,* 22 BRBS 61, 64 (1989), and there is no dispute that claimant notified employer of the agreement prior to the hearing, we affirm the administrative law judge's determination that Section 33(g) does not bar claimant's entitlement to benefits.[1] We therefore need not reach the arguments regarding the nature of the agreement with Bell.[2]

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1. We reject employer's contention that the administrative law judge erred in permitting argument on the issue of whether claimant was a "person entitled to compensation" because claimant failed to include the issue in her pre-hearing statement. As claimant points out, the question of whether she was a "person entitled to compensation" is encompassed within the scope of Section 33(g). *See Young v. Todd Pacific Shipyards Corp.,* 17 BRBS 201, 204 n.2 (1985). Furthermore, as claimant observes, employer did not object to consideration of the issue at the hearing.

2. We note, however, that if the agreement between claimant and Bell is not a settlement, Section 33(g)(1) could not bar the claim under the Act regardless of whether claimant was a "person entitled to compensation" of whether employer approved the agreement. *See generally Mills v. Marine Repair Servic,* 22 BRBS 335 (1989), *modifying in part on reconsideration* 21 BRBS 115 (1988).

APPENDIX F

PETROLEUM HELICOPTERS, INC.
and American Home Assurance
Company, Petitioners.

v.

Mary E. BARGER and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,
Respondents.

NO. 90-4022

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Sept. 4, 1990.

Widow of employee, who was killed in helicopter crash on flight between fixed platforms on the Outer Continental Shelf in the Gulf of Mexico, sought benefits under the Longshore and Harbor Workers' Compensation Act. Administrative law judge awarded benefits and the Benefits Review Board affirmed. Employer petitioned for review. The Court of Appeals held that widow, who failed to obtain employer's prior consent for settlement with helicopter manufacturer, was not entitled to benefits.

Vacated and remanded.

Vance E. Ellefson, C. Theodore Alpaugh, III, Metairie, La., for petitioners.

Donald Shire, Solicitor of Labor, U.S. Dept. of Labor, Washington, D.C., for appellees.

Mary Ellen Blade, Beckenstein, Oxford, Radford & Johnson, Beaumont, Tex., for Mary E. Barger.

Joshua T. Gillelan, II, Office of the Solicitor of Labor, Benefits Review Bd., U.S. Dept. of Labor, Washington, D.C., for Director.

On Petition for Review of an Order of The Benefits Review Board.

Before GEE, SMITH, and WIENER, Circuit Judges:

PER CURIAM:

Walter Barger was killed when the helicopter he was piloting crashed on a flight between fixed platforms on the Outer Continental Shelf in the Gulf of Mexico. Mr. Barger was employed by Petroleum Helicopters, Inc., (hereafter "PHI"); and, after his death, PHI voluntarily instituted payment of Longshore and Harbor Workers' Compensation benefits to his widow and children.

Mrs. Barger sued Bell Helicopter Textron, the manufacturer of the helicopter, and Petroleum Helicopters, Inc. on the theory that the helicopter was a "vessel" and that Mr. Barger was a "seaman" within the meaning of the Jones Act (46 U.S.C. App. § 688).

Mrs. Barger's counsel was advised that Longshoremen benefits were being paid but that, if the Bargers were contending that Mr. Barger was a "seaman", Longshore benefits were not due and would be terminated. Counsel replied that the plaintiffs' position was that Mr. Barger was a "seaman" and that he was covered by the Jones Act. Longshore benefits were then discontinued. On the eve of trial, Bell and the plaintiffs settled their claims. In return for a release of all liability, Bell agreed that, if cast in judgment, it would pay Mrs. Barger $225,000.00. Mrs. Barger agreed not to execute any judgment

against Bell or seek anything over the agreed amount. Bell's counsel was present for trial, but took virtually no part in the proceedings. Bell was cast in judgment in the District Court, which held the aircraft to be a "vessel" and Mr. Barger to be a Jones Act seaman.

PHI appealed that decision to our Court, and we reversed on the Jones Act Issue. Bell then paid Mrs. Barger in accordance with the settlement agreement, receiving a release of all liability.

On December 12, 1982, Mrs. Barger, contending that she had exhausted any credit for the settlement with Bell, instituted a claim against PHI under the Longshore and Harbor Workers' Compensation Act. PHI opposed the claim on the basis that Mrs. Barger's settlement with Bell was a compromise within the meaning of § 33(g) of the Act, to which PHI, the employer, had not agreed. The Deputy Commissioner, however, awarded compensation benefits to Mrs. Barger. An Administrative Law Judge held that PHI was barred from raising the compromise between Bell and the plaintiff. The Benefits Review Board affirmed the Administrative Law Judge. PHI appeals that decision, and we reverse.

For the reasons stated in our opinion in *Nicklos Drilling Co. and Compass Ins. Co. v. Cowart*, 907 F.2d 1553 (5th Cir. 1990) (per curiam), the judgment of the Benefits Review Board is VACATED and this matter is REMANDED to the Administrative Law Judge for the entry of an order consistent with this opinion.

APPENDIX G

NICKLOS DRILLING COMPANY and
Compass Insurance Company,
Petitioners,

v.

Floyd COWART and Director, Office of
Workers' Compensation Programs,
U.S. Department of Labor,
Respondents.

PETROLEUM HELICOPTERS, INC.
and American Home Assurance Company,
Petitioners,

v.

Mary E. BARGER and Director, Office of
Workers' Compensation Programs,
United States Department of Labor,
Respondents.
NOS. 89-4944, 90-4022.

United States Court of Appeals,
Fifth Circuit.
March 29, 1991.

Appeal was taken from decision of Benefits Review Board which affirmed award of Longshore and Harbor Workers' Compensation Act (LHWCA) benefits to injured employee. In second action, employer petitioned for review of Benefits Review Board decision affirming award of LHWCA benefits to widow of employee killed in helicopter crash. The Court of Appeals, 907 F.2d 1552, 910 F.2d 276, vacated and remanded both cases. On further review of cases, consolidated on appeal, the

Court of Appeals, en banc, held that LHWCA conditions eligibility for continuing benefits on employer's and employer's insurance carrier's prior written approval of any settlement between injured employee and third person for less than employee's LHWCA compensation entitlement, regardless of whether employer or employer's insurer was paying LHWCA benefits at time of settlement.

Affirmed.

Politz, Circuit Judge, filed dissenting opinion in which King and Johnson, Circuit Judges, joined.

On Petition for Review of a Decision and Order of The Benefits Review Board, U.S. Department of Labor.

Before CLARK, Chief Judge, GEE,*

POLITZ, KING, JOHNSON, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

Today we sit *en banc* to resolve a conflict in the law of our Circuit. In the cases consolidated on this appeal, two panels of our Court held that section 33 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933 (1988), conditions eligibility for continuing LHWCA benefits on the employer's and the employer's insurance carrier's prior written approval of any settlement between an injured employee and a third person for less than his LHWCA compensation

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* Judge Thomas Gibbs Gee participated in the en banc consideration of this appeal but resigned from the court on February 1, 1991.

entitlement;[1] and we further held that this approval requirement applies regardless of whether the employer or the employer's insurer was paying LHWCA benefits at the time of settlement. *See also Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644, 647 (5th Cir. 1986). In an unpublished opinion, *Kahny v. Director, Office of Workers' Compensation Programs,* 729 F.2d 777 (5th Cir. 1984), a panel of our Court held the contrary: that section 33's approval requirement applies only if the employer or its carrier is paying LHWCA benefits at the time of the settlement. Resolving this conflict, we now hold that the plain language of section 33 shows Congress's unambiguous intent to require prior approval whether or not the employer or its carrier was actually paying LHWCA benefits at the time of settlement. In the face of this manifest congressional intent no administrative reinterpretation can be countenanced.

Background

In each case before us today, a person seeking LHWCA compensation for death or injury settled a related claim with a third person; and, in each case, the settlement occurred at a time when the person was not receiving LHWCA benefits, was for less than the employee's compensation entitlement, and was consummated without the approval of the employer or his carrier. In *Nicklos Drilling Co. v. Cowart,* 907 F.2d 1552 (5th Cir. 1990), Floyd Cowart, an employee of Nicklos Drilling Company, sought LHWCA compensation for injuries he had received on Nicklos's drilling rig. At a time when Mr. Cowart was not receiving LHWCA benefits from Nicklos

1. Section 33(a) of the LHWCA defines a third party as "some person other than the employer or a person or persons in his employ." 33 U.S.C. § 933(a) (1988).

or its insurance carrier, he settled his claim against Transco Exploration Company, which owned the offshore platform that supported Nicklos's rig. In *Petroleum Helicotpers, Inc. v. Barger,* 910 F.2d 276 (5th Cir. 1990), Mary Barger, the widow of Walter Barger, sought LHWCA compensation for her husband's death. Mr. Barger died when the helicopter that he was piloting crashed. The helicopter was owned by his employer, Petroleum Helicopters, Inc. (PHI), and manufactured by Bell Helicopter Textron. Ms. Barger settled her claim against Bell at a time when she was not receiving LHWCA benefits from either PHI or its insurance carrier. The panel opinions contain more detailed accounts of the facts.

Review of an Administrative Interpretation

Generally, the question before us is whether section 33 of the LHWCA permits any exception to its requirement that all settlements with third persons that leave the employer liable for further compensation benefits have the prior written approval of the employer and the employer's insurance carrier. Specifically, the Office of Workers' Compensation Programs (OWCP) urges us to accept its in-house administrative interpretation that section 33 requires prior written approval only if the employer or its carrier is actually *paying* LHWCA benefits at the time of settlement. In *Kahny* we accepted OW CP's administrative interpretation, but in *Collier, Nicklos Drilling,* and *Barger* we rejected this interpretation.

In support of its position, the OWCP points out that section 33's purpose is to allow a person entitled to LH WCA benefits to receive those benefits and still pursue civil remedies against third persons. According to the

OWCP, the predecessor to section 33 required an election of remedies and often caused severe financial hardship to individuals who chose to pursue civil action and forego LHWCA benefits. OWCP argues that to alleviate this hardship Congress expressly eliminated election of remedies by enacting section 33(a). Extending this argument, OWCP maintains that financial hardship can be avoided only by paying benefits during the pendency of a civil action; thus, settlements require prior or written approval only if the employer or its carrier is actually paying benefits. The actual payment of benefits, according to OWCP, is the price which Congress intended employers to pay for the right of prior approval.

Second, OWCP maintains that section 33(g)(2) can be given complete meaning only if we accept OWCP's administrative interpretation. For convenience, we set out the relevant portions of section 33 here:

> **(a) Election of remedies**
>
> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> * * * * * *
>
> **(g) Compromise obtained by person entitled to compensation**
>
> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation

> to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. § 933 (1988). OWCP argues that the language following the disjunctive "or" in section 33(g)(2) would be rendered partially meaningless if prior written approval of all settlements were always required, because the alternative of merely notifying the employer of such a settlement would have no function.

We begin our consideration of OWCP's position by noting the Supreme Court's guidance in cases involving administrative interpretations.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well

> as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984) (footnotes omitted).

More recent, and more closely in factual point, is the Court's decision in *Demarest v. Manspeaker*, __U.S.__, 111 S. Ct. 599, 112 L.Ed.2d 608 (1991), where the Court unanimously declined to give effect to a "long-standing administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify in federal court proceedings.

> The Court of Appeals, while agreeing that the statutory analysis outlined above was "[o]n its face . . . an appealing argument," 884 F.2d [1343] at 1345 [10th Cir. 1989], relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect, followed by congressional revision of the statute in 1984.
>
> But administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference. See *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 [109 S. Ct. 2854, 106 L.Ed.2d 134] (1989). There is no indication that Congress was aware of the administrative construction, or of the appellate decision

> at the time it revised the statute. Where the law is plain, subsequent re-enactment does not constitute an adoption of a previous administrative construction. *Leary v. United States*, 395 U.S. 6, 24-25 [89 S. Ct. 1532, 1541-42, 23 L.Ed.2d 57] (1969).
>
> When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. . . . We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it. [Quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252, 73 L.Ed.2d 973 (1982).]

__U.S. at__, 111 S. Ct. at 603-04 (footnote omitted).

As *Collier, Nicklos Drilling, and Barger*—our three most recent and only published opinions—demonstrate, we believe that the words of section 33 are unambiguous and therefore foreclose OWCP's contrary administrative interpretation. Yet, OWCP has raised two arguments that, if true, would introduce ambiguity concerning the congressional intent underlying section 33.

Turning to OWCP's first argument, we are unpersuaded that congressional desire to eliminate the financial hardship attendant on election of remedies necessitates an exception to section 33's approval requirement. First, the language of section 33 provides no exception to its approval requirement. Second, section 33(g)(2) does expressly provide that LHWCA benefits *"shall be terminated, regardless of whether the employer or the employ-r's, insurer has made payments or acknowledged entitlement to benefits under this chapter."* 33 U.S.C. § 933 (g)(2) (1988) (emphasis added). This language squarely refutes OWCP's contention that Congress intended the actual payment of benefits to be a tradeoff for the right

of prior approval. Third, OWCP's reading of section 33 is not necessary to prevent financial hardship to persons pursuing civil remedies. Section 33(a) expressly provides that persons entitled to LHWCA benefits need not make an election of remedies; rather, they may receive the LHWCA benefits while simultaneously pursuing the civil remedy. To the extent that LHWCA claimants may choose to ignore their rights and responsibilities under section 33, Congress did not and cannot have intended to guard against such self-inflicted hardship.

We are also unpersuaded that OWCP's administrative interpretation is necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person." 33 U.S.C. § 933(g)(2) (1988). While superficially persuasive, OWCP's argument does not stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that the claimant notify the employer of *any* settlement or judgment whatever. As we note above, prior written approval is required only if, as § 33(g)(1) provides, the amount of the settlement is "less than the compensation to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstances where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress's schemes of approval and notification dovetail perfectly; there is no ambiguity.

Conclusion

After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of section 33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that section 33's prior written approval requirement applies regardless of whether the employer or its carrier is paying LHWCA benefits at the time of settlement. By *Chevron*, there it ends. Accordingly, we AFFIRM our decision in *Nicklos Drilling*, AFFIRM our decision in *Barger*, and OVERRULE our earlier, unpublished decision in *Kahny*.

POLITZ, Circuit Judge, with whom KING and JOHNSON, Circuit Judges, join, dissenting:

I respectfully dissent. In 1984, as a member of an oral argument panel I authored the unpublished opinion in *Kahny v. Arrow Contractors*, 729 F.2d 777 (5th Cir. 1984), (*aff'd mem.*), in which we accepted the interpretation of the Director of the Office of Workers Compensation Programs, that the phrase "person entitled to compensation" as used in 33 U.S.C. § 933(g) meant a person either receiving compensation benefits or the beneficiary of an ALJ award. I then considered such to be a proper interpretation of that statutory phrase; I am of the same opinion still.

The Director of the OWCP has so interpreted the phrase in an untold number of cases. In his briefs the Director has detailed the reasoning behind the interpretation, including the statutory and legislative history of the parent legislation pertinent to the phrase. The Director advises that his conclusion is based not only

upon that statutory and legislative history, but is informed by years of practical experience in administering the Longshore and Harbor Workers Act in many thousands of cases.

The majority rejects the Director's interpretation out of hand. I am not disposed to do so. Deference must be more than lip service. Deference presupposes deferring when one disagrees, otherwise there is no deference.

In this circuit we have recognized, both *en banc* and in panels, that the construction placed on the Act by the Director is to be given the deference we are constrained to give an administrative agency. *See, e.g., Boudreaux v. American Workover,* 680 F.2d 1034, 1046 n. 23 (5th Cir. 1982) (*en banc*); *Alford v. American Bridge,* 642 F.2d 807, 809 n. 2 (5th Cir. 1981).

I view the Director's construction of the subject phrase to be a reasonable one, given the statutory and legislative history of the Act. Early on a person injured on the job had to elect either to proceed under the Act or to seek recovery in tort. Congress deemed this too harsh and eliminated the election requirement. In its place it placed the consent and, later, notice requirements in the Act. Both have a place in a comprehensive scheme which I perceive as just to all concerned. One need not elect but simultaneously may proceed in comp against the employer, while proceeding in tort against a responsible third party. If one does the latter and is receiving comp benefits from the former one must secure the employer's consent to settle *if one is to preserve the right to receive comp payments in excess of the tort settlement.* That is totally appropriate and fair because the employer is entitled to a credit for the sums recovered in tort in the

instance of a job-related injury caused by a tortiously-acting third person. But the requirement is not absolute.

Assume a not infrequent occurrence. The employer denies owing compensation and refuses to pay. The employee seeks tort recovery from a third party. A settlement is offered. Why must the employee, who was denied comp, go hat in hand to the employer and request permission to settle his claim? Why should he? This query is not simply erecting a straw man. In one of the consolidated cases, *Barger*, we find the anomaly of the employer defensing a Jones Act claim by Barger's survivor by formally judicially claiming that it owed only LH WCA comp payments for Barger's accidental death, and then defensing the subsequent comp claim by insisting that the survivor had forfeited her comp claim because she did not get the employer's approval to settle the tort claim against a third-party tortfeasor.

I agree with the Director's long-standing construction that it is not reasonable to require an employee to secure the approval of the employer before making a tort settlement if the employer has declined to pay comp benefits. I can conceive of no valid purpose to be served by requiring otherwise other than to serve as the basis for forfeiture of a legitimate comp claim by an injured worker or the survivors of a deceased worker. The parties argue that the statute was amended to overrule the Director's erroneous interpretation. If that were so one would expect some small reference to such in the legislative history. There is none. There is no acceptable explanation offered for the absence of such.

In 1984 the provision containing the phrase at issue was reenacted without change. Surely that ought to be some indication that the universal construction given the

phrase by the Director, multiple ALJs, the Benefits Review Board, and several courts has received congressional approval. I am so persuaded.

Finally, the provision for notice added in 1984, section 933(g)(2), adds to the force of the Director's construction. The Act first provides for approval of the employer if comp is being paid. In the notice provision the Act goes on to require notification of a settlement or judgment, *whether comp is being paid or not*. To me this latter is to alert the employer and comp carrier of the existence of an offset against any comp entitlement. It is a reasonable requirement to prevent double recovery. Nothing more.

I am convinced that the Director's interpretation in this instance is reasonable and I therefore respectfully dissent.

APPENDIX H

81-475 & 81-475A

DECISION AND ORDER

EDNA KAHNY
(Widow of DAN KAHNY)
Claimant-Petitioner
Cross-Respondent

v.

ARROW CONTRACTORS OF
JEFFERSON, INCORPORATED
and
LIBERTY MUTUAL INSURANCE COMPANY
Employer/Carrier-Respondent
Cross-Petitioners

Digest Section

407; 601; 604; 1711; 1801[1]; 2701; 3704; 3706

Syllabus

The Board held that a claimant who was reimbursed for funeral expenses pursuant to section 9(a) is not a "person entitled to compensation" under section 33 (g) and is thus not barred from recovering compen- to a third party settlement where the employer had to a third party settlement when the employer had not paid any death benefits to claimant at the time of the settlement. The Board also found that claimant was decedent's widow despite the fact that claimant and decedent were living apart at the time of decedent's death since there was a justifiable cause for their separation and a "conjugal nexus" existed between claimant and decedent. In line with the Fifth Circuit's holding in *Petro-Weld, Inc. v. Luke,* and earlier Board opinions, the employer was entitled

to a section 33(1) setoff, to be applied against accrued and future compensation payments, despite the insurer's waiver of subrogation rights. Recovery of attorney fees for services performed in securing the third party recovery was denied, in line with the Supreme Court's opinion in *Bloomer v. Liberty Mutual Ins. Co.*, affirming the amount of claimant's net proceeds from the third party settlement as a factual determination that was supported by substantial evidence.

Appeal from the Decision and Order of J. F. Walker, Administrative Law Judge, United States Department of Labor.

J. B. Jones (Jones, Jones & Alexander), Cameron, Louisiana, for the claimant.

Stewart E. Niles, Jr. and Kristyne H. McCullough (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

MILLER, Administrative Appeals Judge:

These are appeals by claimant and employer/carrier from a Decision and Order (80-LHCA-61N) of Administrative Law Judge J. F. Walker pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (hereinafter, the Act).[1]

Dan Kahny was accidently killed on February 22, 1979, while working on an offshore stationary pipeline. De-

1. Hereinafter, Arrow Contractors of Jefferson, Inc., and its insurance carrier, Liberty Mutual Insurance Company will be jointly referred to as employer.

cedent's widow, Edna Kahny (hereinafter, claimant), filed a claim for benefits under the Act on May 15, 1979. On or about May 14, 1979, claimant instituted a third party claim that also arose out of the death of her husband. Liberty Mutual Insurance Company was an intervenor in this third party action. However, prior to the trial in the third party action, the parties reached a compromise settlement.

Subsequently, claimant's compensation claim came before Administrative Law Judge J. F. Walker. Judge Walker found that claimant qualified pursuant to Section 2(16) of the Act as the surviving widow of decedent. 33 U.S.C. § 902(16). Moreover, Judge Walker found that claimant was not barred by Section 33(g) of the Act, 33 U.S.C. § 933(g), from recovering compensation as a result of her compromise settlement. Accordingly, while employer was found liable for death benefits, employer was also found entitled to a setoff to be credited against the net sum recovered in the third party settlement.

Claimant now appeals the administrative law judge's finding that she received net proceeds of $83,333.34 plus $4,000 living expenses in her third party settlement. Claimant asserts that the record supports a finding that she received net proceeds of only $83,333.34. In addition, claimant appeals the administrative law judge's finding that employer is entitled to a setoff pursuant to Section 33(f) of the Act. 33 U.S.C. § 933(f). However, in the alternative, claimant asserts that, if any setoff is to be applied, it should only apply to the amount of the compensation award that will accrue in the future and should not apply to compensation that accrued in the past. Finally, claimant requests that the Board approve an award of attorney's fees in the amount of $14,106.42.

On cross-appeal employer raises seven issues:

(1) whether claimant established her status as decedent's widow;

(2) whether claimant waived her right to compensation by failing to comply with the provisions of Section 33(g);

(3) whether a waiver of subrogation in favor of one third party defendant acts as a waiver in favor of all of the third party defendants;

(4) whether a waiver of subrogation prevents an employer from exercising its Section 33(f) right to a setoff against the third party settlement;

(5) whether employer's setoff should be applied against both accrued and future compensation;

(6) whether claimant's net recovery from the settlement was $87,333.34; and,

(7) whether an attorney's fee of $14,106.42 is reasonable.

Initially, we note that the Board's scope of review of an administrative law judge's Decision and Order is limited. Consequently, provided that the findings and conclusions are supported by substantial evidence, are rational, and are in accordance with law, the Decision and Order must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Asssociates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3).

As a threshold issue, we address the question of whether claimant qualifies pursuant to Section 2(16) as the surviving widow of the decedent.[2] Section 2(16) of

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2. The issues raised in this appeal and cross-appeal will be addressed in the order that the issues are listed in employer's cross-appeal.

the Act defines "widow" as "the decedent's wife . . . living with or dependent for support upon him . . . at the time of his . . . death; or living apart for justifiable cause or by reason of his . . . desertion at such time." In the instant case, the evidence clearly establishes that decedent and claimant were living apart at the time of decedent's death. Employer argues that this fact combined with claimant's living with her mother at the time of decedent's death indicates that the marriage was not in full force.[3] Nevertheless, the administrative law judge found claimant to be the surviving widow of decedent inasmuch as they were "living apart for justifiable cause."

Claimant testified that, in 1978, decedent concluded that he had advanced as far as he could at his then present employment, so he quit that job and decided to go to Louisiana to seek new employment. Claimant further testified that, when decedent left for Louisiana, it had been agreed that he would go alone and would later come for his wife when he had found a place to live. This testimony was corroborated by the testimony of Deborah Martin, claimant's daughter, who testified that, one week before he was killed, decedent had told her that claimant would be moving to Louisiana as soon as things got "squared away." After decedent left for Louisiana, claimant and decedent continued to correspond with each other, decedent would send claimant money, and claimant visited decedent in Louisiana on one occasion.

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3. Claimant was previously married on three other occasions. In its brief, employer argues that returning to live with her mother was a pattern that claimant had followed prior to each of her three earlier divorces. However, an objection to the introduction of evidence supporting this assertion was sustained by the administrative law judge.

In *Thompson v. Lawson,* 347 U.S. 334 (1954), the Supreme Court held that, in cases where the claimant was living apart from her spouse and the issue was whether there was justifiable cause, there must be a "conjugas nexus" between the claimant and the decedent at the time of the latter's death.

There is sufficient evidence in the record to support a conclusion that there was a "conjugal nexus" between claimant and decedent at the time of decedent's death. *Accord, General Dynamics Corp. v. Director, OWCP,* 9 BRBS 188, 585 F.2d 1168 (1st Cir. 1978), *aff'g Murphy v. General Dynamics Corp.,* 7 BRBS 960 (1978). As the administrative law judge found, the evidence of record shows that "the mere physical separation was intended to be temporary for the period necessitated by decedent's efforts to seek, find and to get located in a new job at a new location." Decision and Order, slip op. at 4. The administrative law judge's finding—that there was a justifiable cause for decedent and claimant living apart—is, therefore, affirmed.

Next considered is the issue of whether claimant waived her right to compensation by failing to comply with Section 33(g). Section 33(g) provides as follows:

> If compromise with such third person is made by the person entitled to compensation or such represesntative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form

> provided by the Secretary and filed in the office of of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

In the instant case, the facts clearly indicate that claimant did not obtain employer's written approval of the third party settlement on a form provided by the Secretary and that no approval was ever filed with the deputy commissioner. However, the administrative law judge held that, under the circumstances of the instant case, it was fair to conclude that claimant was not barred from recovering compensation by her failure to literally comply with Section 33(g). The administrative law judge reasoned that, inasmuch as Liberty Mutual Insurance Company was an intervenor in the third party action, it was in a position to protect itself against the "evils" to which Section 33(g) is addressed.

Section 2(12) of the Act, 33 U.S.C. § 902(12), includes a general definition of the term "compensation":

> "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1978), one of the leading cases on the "plain meaning" rule, expressly states that the language to be applied must be interpreted "in its context." 425 U.S. at 201. *See also Intercounty Construction Corp. v. Walter,* 2 BRBS 3, 6-7, 9, 422 U.S. 1, 7-8, 11 (1975), where the Supreme Court emphasized that the proper interpretation of a phrase in the Act depends upon its historical and statutory context, and *Newport News Shipbuilding & Dry Dock Co. v. Fishel,* BRBS, F.2d, No. 81-2217 (4th Cir. Nov. 19, 1982) slip op. at 3-4.

In interpreting the Act, one must be guided by the oft-repeated directive of the United States Supreme Court that the provisions of the Act must be construed so as to avoid incongruous or harsh results. *Northeast Marine Terminal Co. v. Caputo,* 6 BRBS 150, 162, 432 U.S. 249 (1977); *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *Baltimore & Philadelphia Steamboat Co. v. Norton,* 284 U.S. 408, 414 (1932).

The Supreme Court demonstrated the extent to which the purpose of the Act must govern the "plain meaning" of the statutory language in *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962).[4] In *Calbeck,* the Supreme Court interpreted Section 3(a) of the Act, which at the time provided for recovery of benefits under the Act only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law," concluding that both Congressional intent and the beneficent purpose of the Act required this phrase to be interpreted as allowing coverage under the Act even though the claimant may have already recovered benefits under a state workmen's compensation statute. Such a result was considered necessary to "provide federal compensation for all injuries

4. Contrary to the assertions of our dissenting colleague, no implication is to be derived that the "plain meaning" of the statute is that funeral expenses *must* be considered "compensation" for the purposes of *all* sections of the Act where these words occur, or that the "plain meaning" rule requires that a person entitled to funeral expenses be considered a "person entitled to compensation" for the purpose of Section 33(g) of the Act. Rather, as expounded in

to employees on navigable waters" and "to assure the existence of a compensation remedy for every such injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the 'local concern' doctrine." 370 U.S. at 120-22 (footnote deleted).

The decision of the majority in *Calbeck* was attacked by Mr. Justice Stewart in a dissenting opinion as providing too much emphasis to the purpose of the Act at the expense of the "plain language" of the statute.

> In the Longshoremen's and Harbor Workers' Compensation Act. . . . Congress carefully provided for the recovery of benefits only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.' . . . Now, thirty-five years later, the Court concludes that Congress did not really mean what it said. I cannot join in this exercise in judicial legerdemain. I think the statute still means what it says, and what it has always been thought to mean—namely, that there can be no recovery under the Act in cases where the State may consitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is simply not what the law provides.

370 U.S. at 132. However, even though Mr. Justice Stewart attacked the majority's conclusion, his true reason for disagreement was *not* that the purposes of the Act should not be given great weight; he merely felt that the language of the Act *did* reflect the purposes of the Act on this point.[5]

Ernst &Ernst, the "plain meaning" of a statute cannot be determined in a vacuum, but must be interpreted "in its context."

5. I seriously doubt whether statutory language as clear as that in 33 U.S.C. § 903(a), 33 U.S.C.A. § 903(a), could ever be

The Supreme Court's recent decision in *Potomac Electric Power Co. v. Director,* OWCP, 14 BRBS 363, U.S., 101 S.Ct. 509 (1980) [hereinafter, PEPCO], is not inconsistent with this principle. Although the majority opinion seemed to rely upon the "plain language" approach in determining the question of whether a claimant suffering from a permanent partial disability under the schedule, 33 U.S.C. § 908(c)(1)-(20), may elect to proceed under Section 8(c)(21), 33 U.S.C. § 908 (c)(21), their determination was actually based upon the fact that "[d]uring the first half century of administration of the [Act], federal tribunals consistently construed the schedule benefits provision as exclusive." 14 BRBS at 366, 101 S. Ct. at 514. The policy considerations underlying the doctrine of *Stare decisis*, therefore, were the dispositive factors in *PEPCO*. 14 BRBS at 366-67, 101 S. Ct. at 513-14.

The principle that, depending upon the purposes of the various sections in which it is used, different meanings may attach to a word or phrase found throughout the Act was well expressed by our dissenting colleague, Judge Kalaris, in *Dunn v. Todd Shipyards Corp.*, 13 BR BS 647 (1981).[6] After noting the definition of "injury" found in Section 2(2) of the Act, 33 U.S.C. § 902(2), Judge Kalaris continued:

> ignored in the name of effectuating the supposed 'Congressional desire.' Be that as it may, this particular statutory language does in fact reflect the purpose of Congress, ...

370 U.S. at 132-33.

6. Our dissenting colleague objects to the use of her language from *Dunn,* arguing that the meaning of the term "time of injury," the question raised in *Dunn,* required resort to the purposes of the Act "because the language of the Act was insufficient." First, just as the phrase "time of injury" in *Dunn* required more than blind application of the definition of "injury" contained in Section 2(2)

In examining the possible different meanings of "time of injury," as well as the different statutory concepts attached to the word "injury," we have noted the rule of statutory construction that a statute is to be interpreted as a whole. *See Sands, 2A Sutherland Statutory Construction*, § 46.05 (1978). A natural corollary to this rule is that, when the same term is used in several sections of a statute, it should be interpreted in the same manner. This corollary, of course, must yield before the purpose behind the law at issue and cannot be inflexible. The Supreme Court itself has noted that:

> Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, *there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.* Courtauld v. Leigh, L.R., 4 Exch. 126, 130. But *the presumption* is not rigid and *readily yields whenever there is such a variation in the connection in which the words are used* as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

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of the Act, the phrase "person entitled to compensation" also requires more than the blind application of the definition of "compensation" contained in Section 2(12) of the Act. Second, were the "plain meaning" rule as narrowly interpreted as our dissenting colleague would require, such an interpretation would have been more applicable to the term "injury" defined in *Dunn* than it would be to the term "compensation" dealt with in the instant case, for in *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952), cited by our dissenting colleague as requiring that the "plain meaning" of the statute may not be ignored, the United States Supreme Court was concerned with the definition of the term "injury." If our colleague's restrictive interpretation of *Pillsbury* were to be held controlling, then it is our colleague's opinion in *Dunn* that stands on shaky ground indeed.

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433, 52 S. Ct. 607, 608-609 (1932) (emphasis added). *See Bituminous Coal Operators' Association, Inc. v. Hathaway,* 406 F. Supp. 371 (W.D. VA. 1975) *aff'd,* 547 F.2d 240 (4th Cir. 1977).

> We conclude that there is such a "variation in the connection" of the ways in which "injury" and especially "time of injury" are used in the Act that application of a single definition of "time of injury" would denigrate the purpose behind some of the provisions of the Act.
>
> The statute at issue, the Longshoremen's and Harbor Workers' Compensation Act, is an integrated workers' compensation scheme. The various sections thereof were obviously intended by Congress to implement the various concepts of workers' compensation which must be applied to each case. It is clear, for example, that the considerations which led to the adoption of the "manifestation" rule in Section 13 (a) cases are not applicable to Section 10. . . .
>
> Thus, rather than relying upon definitions for "time of injury" under any other section of the Act, we must look at all possible definitions for "time of injury" under Section 10. Our intent is to set a date for "time of injury" under Section 10 which best effectuates Congressional purpose, which best comports with the language of the Act, which fairly balances competing interests of claimants, employers and carriers, and which best accommodates the variety of occupational disease claims covered by the Act.

13 BRS at 655-56 (footnote deleted).

As in *Dunn,* there is such a "variation in the connection" of the ways in which "compensation," and especially "person entitled to compensation," are used

in the Act that application of a single definition of "compensation" would denigrate the purpose behind certain of the Act's provisions. As Judge Kalaris correctly noted in *Dunn*, application of terms such as "compensation" and "person entitled to compensation" requires consideration of the best effectuation of Congressional purpose, the language of the Act, a fair balance of the competing interests of the parties, and applicability to the various circumstances which may arise under that section of the Act.

In the instant case, at the time of the settlement of the third party action, the only money that claimant had received from employer with regard to the compensation claim was $1,500 in funeral expenses.[7] The definition of the term "compensation" provided in Section 2(12), 33 U.S.C. § 902(12), includes funeral benefits. Thus, employer argues that its payment of funeral expenses was payment of compensation and that claimant was a "person entitled to compensation."

In *O'Leary v. Southeast Stevedoring Co.*, 7 BRS 144 (1977), the Board addressed the question of the meaning of the phrase "person entitled to compensation" as found in Section 33(g) of the Act and outlined the policies which must be considered in making such an interpretation under this section.

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7. It is clear that claimant received $1,500 from employer. Employer argues that this $1,500 was a lump sum payment of fueneral benefits. *See* Brief of Employer at 3-4. Claimant, through her attorney, states that she requested funeral expenses and that the employer sent her $1,500. *See* Oral Argument Transcript at 9. Sction 9(a) of the Act, 33 U.S.C. § 909(a), provides for reasonable funeral expenses *not to exceed* $1,000. There is no explanation in the record, and inquiries at oral argument were unable to determine, why claimant received $500 more than the amount provided for in the Act. Under these circumstances, the contention of both parties that this $1,500 was for funeral expenses is accepted.

The Board is aware that the language in Section 33(g) was amended in 1972 to strengthen the requirement that claimant obtain the written consent of the employer. However, in interpreting the language of Section 33(g), it must be read in the context of the remainder of Section 33 and of the Act as a whole, and in line with the humanitarian and beneficent purposes of the Act. *Voris v. Eikel*, 346 U.S. 328 (1953). The Act is clearly written with the underlying concept that the employer upon being informed of an injury will voluntarily begin to pay compensation. *See* U.S.C. § 914(a). The provisions of Section 33 similarly contemplate either payments being made voluntarily or pursuant to an actual award. Section 33(g) which requires the consent of the employer to the third party settlement refers to Section 33(f) which indicates that in cases of third party settlement, the employer's *liability* to the claimant is for those sums in excess of that gained in the third party setltement, the very language contemplating that employer either be making voluntary payments under the Act or that it had been found liable for benefits by a judicial determination. Moreover, Section 33(b) provides:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

This provision clearly implies an employer's rights under Section 33 derive solely from their making either voluntary payments under the Act or pursuant to an award. . . .

Only where an employer voluntarily pays compensation or where an award is entered against the

> employer does it make sense to require written consent by employer to the third party settlement. To find otherwise could severely prejudice a claimant's rights. If a claimant was injured through the negligence of a third party and the employer denied coverage under the Act, a claimant would be forced to sue the third party. However, even if the claimant obtained a reasonable settlement offer, an employer could refuse to give its consent to the third party settlement for any number of reasons, e.g., it does not wish to approve the settlement on a form provided under the Act since its consent to jurisdiction under the Act might be inferred. This could result in a claimant not being paid any compensation, yet the claimant would be afraid to make a third party settlement for in so doing he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third party settlement without employer's consent to obtain money (the Act providing no procedure for waiving employer's consent unlike some state acts). Surely, Congress by requiring written consent could not have contemplated such a result.

7 BRBS at 147-49.[8] *See also Caranante v. International Terminal Operating Co.*, 7 BRBS 248 (1977).

It cannot be held that Congress intended the harsh and incongruous results which would occur if the appli-

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8. The Board's decision in *O'Leary* was affirmed by the United States Court of Appeals for the Ninth Circuit in an unpublished opinion. No. 78-1339 (9th Cir. May 30, 1980). In its brief opinion, the Ninth Circuit quoted a portion of the Board's language and concluded as follows:

> The dominant purpose of the Longshoremen's Act is to aid injured Longshoremen and their dependents. *Reed v. The Yaka*, 373 U.S. 410 (1963). The Board's ruling is reasonable and furthers the underlying purpose of the Act.

Slip op. at 3.

cation of the strictures contained in Section 33(g) were interpreted to turn upon a claimant's receipt or non-receipt of the limited sum provided for funeral expenses. As noted in *O'Leary*, "[t]he Act is clearly written with the underlying concept that the employer will voluntarily

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Our dissenting colleague's assertion that *O'Leary* has been quoted in a misguided and misleading fashion is both incorrect and unsupported. The holding in *O'Leary* is clear: if a claimant is not a "person entitled to compensation," then an employer may not take advantage of the provisions of Section 33(g) of the Act. In *O'Leary*, the Board discussed the factors which led it to conclude that the employer was neither making voluntary payments under the Act or pursuant to an award and, therefore, the claimant was not a "person entitled to compensation." A close reading of *O'Leary* cannot but lead one to conclude that the instant claimant, as well, does not fall under the rubric of one who is a "person entitled to compensation" and that the above language is neither "taken out of context" nor "incomplete."

Simply put, it is clear that our dissenting colleague disagrees with the rationale and result of *OLeary* and would not have agreed to the decision in that case had she been on the Board at that time. However, two legal principles are interposed between our dissenting colleague's actions and the undermining of *O'Leary*. First, the general legal principle of *stare decisis* demands adherence to the Board's own prior decisions. *See Shahady v. Atlas Tile & Marble Co.*, .. BRBS , 682 F.2d 968 (D.C. Cir. 1982). Second, our dissenting colleague's unprecedented reading of *Voris v. Eikel*, 346 U.S. 328 (1953), is directly contrary to the numerous United States Supreme Court directives regarding the beneficent purpose of the Act, which is to give paramount consideration to the plight of the disabled worker, for it is he who suffers grievously should inadvertent error be committed, while the employer is not as irrevocably stricken by inadvertent error as the employee and is best able to spread the costs of the work injuries through the devices of the marketplace. *See Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408 (1932); *see also Newport News Shipbuilding & Dry Dock Co. v. Fishel*, BRBS , F.2d , No. 81-2217 (4th Cir. Nov. 29, 1982), slip op. at 6 ("The purpose of the Act is to help longshoremen"), and my dissenting opinion in *Volpe v. Northeast Marine Terminals*, 14 BRBS 1, 22 (1981), *vacated and remanded*, 14 BRBS 538, 671 F.2d 697 (2d Cir. 1982). If this beneficent purpose be sand, then it is an admirable foundation and is of the same character as the sands upon which the pyramids rest, for it has shifted not one inch in fifty years.

begin to pay compensation. *See* 33 U.S.C. § 914(a)." 7 BRBS at 147. *O'Leary* also recognized that Congress "could not have contemplated" that a claimant who is without a steady income during the pendency of his third party claim may be forced into accepting a third party settlement in violation of Section 33(g) because of the unreasonable recalcitrance of his employer. 7 BRBS at 149.[9] Congressional intent, therefore, mandates that a claimant who merely receives funeral expenses is not a "person entitled to compensation" under Section 33(g) of the Act and cannot, through operation of that section, be forced to relinquish his right to compensation.

The language of the Act also requires this interpretation of the phrase "person entitled to compensation." The claimant is not entitled to a simple lump sum upon the death of the employee, such lump sum being denoted "funeral expenses." Rather, Section 9(a) provides for the payment of the following: "Reasonable funeral expenses not exceeding $1,000." The language of Section 9(a) does *not* state that a *claimant* is entitled to such benefits: rather, it contemplates that the payment is to be made to the person or business that supplied the funeral services or related items, or to the person or persons that paid for same limited to the actual expenses incurred up to $1,000. The Act contemplates payments being made to the claimant under Section 9(a) only if the funeral expenses have already been paid by the claimant; and, if so, the monies paid are simply a reimbursement of expenses and do not make the claimant a "person *entitled* to compensation."

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9. As noted *supra* at note 6, the Ninth Circuit affirmed the Board's interpretation of Congressional intent in *O'Leary*.

This interpretation is required by the decision of the United States Supreme Court in *Marshall v. Pletz,* 317 U.S. 383 (1943), where the question presented was whether the furnishing of medical care constituted the "payment of compensation" under Section 13(a) of the Act, 33 U.S.C. § 913(a). In the following passage, the Supreme Court explained why the receipt of monies to defray medical expenses did not constitute "compensation":

> It may be argued that as 7 is the section dealing with medical care, Congress meant to include such care within the term "compensation." In the normal case, however, the insurer defrays the expense of medical care but does not pay the injured employee anything on account of such care. Only if the employer and the insurer omit to furnish such care can the employee procure it for himself and then obtain from the deputy commissioner an award to reimburse him for what he has spent.

317 U.S. at 391. The language of the Act, therefore, requires that Section 33(g) be interpreted so that a claimant is not considered a "person entitled to compensation" merely because he has been reimbursed for funeral expenses.

In determining a fair balance of the competing interests of the parties, the history of Section 33(g) must be considered. Prior to the 1959 amendments to the Act, Pub. L. No. 86-171, 73 Stat. 391, a claimant was required to elect whether to receive compensation benefits or to file a suit to recover damages against a third party. Longshoremen's and Harbor Workers' Compensation Act, ch.

In the passage from *O'Leary* cited *supra,* the Board recognized the balancing of equities involved both in the

passage of the various amendments to Section 33 of the Act and interpreted the phrase "person entitled to compensation" in such a manner as to avoid a result that "could severely prejudice a claimant's rights." 7 BRBS at 148. The interpretation herein likewise provides full recognition and consideration of the interests of all parties.

The extent to which this interpretation balances the equities is best demonstrated by reference to the fourth *Dunn* factor: applicability to the various circumstances which may arise under Section 33(g) of the Act. One observation is sufficient to demonstrate the severe inequities which could result if this interpretation is not accepted. If an employer pays *no* voluntary compensation and no award has been entered, the consent of the employer is not required in order for a claimant to settle his third party claim. *O'Leary*. However, if the same employer were to directly pay a funeral home the nominal expenses of a pauper's funeral and yet refuse to pay a destitute widow the weekly compensation benefits, the employer would obtain approval rights under Section 33(g) over any settlement which the widow might attempt to make, no matter how favorable the terms of the settlement may be.

Payment of funeral expenses is not necessarily a concession that a particular claimant is a "person entitled to compensation." In the instant case, for example, while employer has paid funeral expenses, it has also continued to vigorously contest claimant's status as decedent's widow at every opportunity and, thus, has consistently controverted claimant's right to compensation. Under such facts, it is impossible to consider claimant a "person entitled to compensation."

In light of the above, it is clear that, in order for a claimant to be a "person entitled to compensation" for purposes of Section 33(g), such claimant must be either receiving the weekly compensation benefits or death benefits to which he is entitled for support, or such payments have been made pursuant to an award. *See O'Leary.*[10]

Therefore, claimant was not a "person entitled to compensation" at the time of her third party settlement since at that time employer had not paid any death benefits. Accordingly, the administrative law judge's finding that claimant was not barred by Section 33(g) from recovering compensation pursuant to the Act is affirmed.[11]

Next to be considered are the issues of whether employer is entitled to apply his liability in the third party settlement against his compensation liability and, if so, whether this setoff should apply to both accrued and future compensation. Section 33(f) provides that, where a claimant recovers in a third party suit, the employer's liability under the Act will be for the excess of that which

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10. Our dissenting colleague simply misses the mark regarding the instant interpretation of Section 33(g). Under current Board law as expressed in *Devine v. National Creative Growth, Inc.*, BRBS , BRB No. 81-368 (Oct. 25, 1982), it is clear that the claimant, if a "person entitled to compensation," would be subject to the stringent requirements of Section 33(g), requirements clearly intended by Congress. However, as pointed out in *O'Leary*, Section 33(g) is not activated *unless claimant is a "person entitled to compensation."* Section 33(g), therefore, is *not applicable* to the instant case.

11. The administrative law judge found that the bar to compensation contained in Section 33(g) was not applicable since Liberty Mutual Insurance Company had been a party in the third party action and thus had been afforded the opportunity to protect its interest. The decision herein renders it unnecessary to address employer's appeal of this finding.

claimant is due pursuant to the Act over the amount recovered in the third party action. 33 U.S.C. § 933(f).

However, in the instant case, in its insurance contract, Liberty Mutual Insurance Company waived its subrogation rights against Marathon Oil Company, with whom Arrow Contractors was a subcontractor. Claimant now takes the position that, since Liberty waived its right of subrogation against Marathon Oil Company, the defendant in the third party suit, employer should not now be allowed to offset its compensation liability against the third party settlement.

Citing to *Petro-Weld, Inc. v. Luke,* 619 F.2d 418, 12 BRBS 338 (5th Cir. 1980), *rev'g in pertinent part* 8 BRBS 369 (1978), the administrative law judge rejected claimant's assertion that employer had "lost" its right to a setoff because of the waiver of subrogation contained in the insurance contract. In *Luke,* the Fifth Circuit stated the Section 33(f) "has nothing to do with the right of subrogation of the employer-carrier." 619 F.2d at 421. Thus, in *Luke,* the court held that carrier's agreement with employer to waive its subrogation rights against the third party tortfeasor did not prevent employer from receiving the benefit of Section 33(f).

In the Fifth Circuit, *Luke* is the leading case on the issue of the effect of a waiver of subrogation on an employer's right to a Section 33(f) setoff. Accordingly, as the instant case arises in the Fifth Circuit, both the administrative law judge's reliance on *Luke* and his ultimate conclusion that the waiver of subrogation did not affect 509, § 33(a), 44 Stat. 1440 (amended 1959). Congress recognized that this led to inequitable results, noting that the election requirement forced claimants who were often

hard-pressed to meet their everyday living expenses either to accept compensation or to become prey "for the unscrupulous who have been known to 'stake' an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage." S. Rep. No. 428, 86th Cong., 1st Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 2134-35. Primary congressional concern was "due recognition of the equities and rights of all who are involved." *Id.* at 2135.
employer's right to the benefits of Section 33(f) are affirmed.[12]

In finding employer entitled to a setoff, the administrative law judge also held that the setoff from the third party settlement should be applied against both accrued and future compensation. Claimant appeals this decision and argues that the setoff should only be applied against the award of future benefits.

The Board has held that, pursuant to Section 33(f), employer is entitled to offset its third party settlement against both accrued and future medical expenses. *Ruby v. Dresser Offshore Services, Inc.*, 8 BRBS 432 (1978). After careful consideration of the arguments raised by

12. Claimant argues that *Luke* was wrongly decided by the Fifth Circuit and that the correct statement of the law as to waivers of subrogation is *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975), and *Capps v. Humble Oil & Refining Co.*, 536 F.2d 80 (5th Cir. 1976). However, *Luke* is the more recent statement of the law, reversing the Board's reliance on *Allen* and *Capps* under circumstances analogous to the instant case. *Allen* and *Capps* did not involve Section 33(f). Rather, they concerned whether an insurance carrier's waiver of subrogation barred the carrier from thereafter asserting a lien against or participating in the proceeds of the settlement between claimant and a third party tortfeasor in order to recoup compensation payments already made. *Luke* is clearly controlling in the instant case.

both claimant and employer, our decision in *Ruby* is hereby held to be applicable to compensation payments as well as medical expenses. Accordingly, the administrative law judge's finding that employer is entitled to a setoff to be applied against both accrued and future compensation is affirmed.

Having determined that employer is entitled to a setoff, whether the administrative law judge erred in computing the net proceeds that claimant received in her third party settlement must now be determined. In determining the amount of an employee's third party recovery against which the employer's liability for benefits under the Act may be credited, only the employee's net third party recovery may be offset. *Nacirema Operating Co. v. Oosting,* 456 F.2d 956 (4th Cir. 1972), *cert. denied,* 409 U.S. 980 (1972); *Ruby.*

In his findings of fact, the administrative law judge held that claimant received net proceeds of $87,333.34 ($83,333.34 plus $4,000 living expenses) from her third party settlement. On appeal, claimant argues that the administrative law judge's finding that the net proceeds from her third party settlement equaled $87,333.34 ignores the stipulation entered into by the parties to the effect that the net proceeds were $83,333.34. Moreover, claimant argues that the $4,000 in living expenses included by the administrative law judge in her net proceeds is in actuality money that she received from her attorney, for which she subsequently reimbursed him.

The determination of a claimant's net proceeds from a third party settlement is a finding of fact, and as such falls within the province of the administrative law judge. The findings of the administrative law judge must be affirmed

if they are supported by substantial evidence in the record considered as a whole, are rational, and are in accordance with law. *O'Keefe, supra.* After careful review of the record, it is concluded that there is substantial evidence to support the finding that claimant's net proceeds from her third party settlement were $87,333.34. The administrative law judge's finding is consistent with the stipulation of the parties that the claimant received $83,333.34 of $125,000 gross settlement after payment of her attorney's fees, *see* Hearing Transcript at 5-6, since testimony was later received that the claimant received $4,000 in living expenses from her attorney prior to the settlement. Hearing Transcript at 61-62. While it is true that the record is of less than ideal clarity with regard to the exact amount of money actually received by the claimant after all reimbursements were made, it cannot be said on this record that the administrative law judge's resolution of this factual issue was irrational or not supported by substantial evidence. Consequently, the administrative law judge's finding is affirmed.

Lastly, claimant's attorney requests that the Board recognize an attorney's fee of $14,106.42 for the proceedings below and reserves the right to seek an attorney's fee for the proceedings before the Board. The Board does not possess the authority to approve an attorney's fee for services performed before the administrative law judge. Accordingly, if counsel wishes to receive an attorney's fee for services performed before the administrative law judge, counsel must comply with 20 C.F.R. § 727.132 and submit a fee petition to the administrative law judge. *Revoir v. General Dynamics Corp.,* 12 BRBS 524 (1980).

Moreover, if counsel wishes to receive an attorney's fee for services performed before the Board, counsel must

also first comply with the Board's Rules of Practice and Procedure. *See* 20 C.F.R. § 802.203. The Board will only compensate counsel for work actually performed before the Board. Further, counsel cannot recover attorney's fees under Section 28 of the Act for services performed in securing claimant's third party recovery. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980).

The administrative law judge's findings—that claimant has established her status as decedent's widow, that Section 33(g) is inapplicable, that employer is entitled to a setoff pursuant to Section 33(f) to be applied against both accrued and future compensation, and that the net proceeds from claimant's third party settlement was $87,333.34—are, therefore, affirmed. We will rule on counsel's request for an attorney's fee for work performed before the Board when counsel complies with 20 C.F.R. § 802.203.

Accordingly, the Decision and Order of the administrative law judge is hereby affirmed.

SO ORDERED.

RAMSEY, Chief Administrative Appeals Judge, concurring:

I concur in the result only.

KALARIS, Administrative Appeals Judge, concurring in part and dissenting in part:

I fully join in my colleagues' decision to affirm the administrative law judge's finding that claimant qualifies pursuant to Section 2(16) as decedent's widow. 33 U.S.C. § 902(16). However, I must strongly dissent from my colleagues' decision to affirm the finding that employer

is liable for compensation despite claimant's failure to comply with the provisions of Section 33(g). 33 U.S.C. § 933(g). In affirming on the Section 33(g) issue, the lead opinion disregards the clear language of the statute and rewrites the Act in precisely the manner Congress sought to avoid.

The lead opinion's strained conclusion that claimant is not a person entitled to compensation, despite her receipt of "compensation" in the form of funeral benefits, is based upon several policy arguments, all of which require that the plain meaning of the statute, as well as the legislative history, be ignored. *Voris v. Eikel,* 346 U.S. 328, 333 (1953); *Pillsbury v. United Engineering Co.,* 342 U.S. 197, 200 (1952). Although I recognize the cases cited by my colleague to the effect that the Act must be construed so as to avoid incongruous or harsh results, I interpret those cases to require a fair and just result, which is neither harsh nor incongruous to either party, not just to the claimant. In the case before us, claimant received "funeral benefits," a money allowance which is included within the definition of "compensation" in Section 2(12). Claimant therefore received "compensation" prior to the settlement of the third party action. She is therefore a "person entitled to compensation" within Section 33(g), *O'Leary v. Southeast Stevedoring Co.,* 7 BRBS 144 (1977), and must obtain prior written approval of her compromise settlement from employer. Claimant's failure to do so relieves employer of liability for compensation. 33 U.S.C. § 933(g). The conclusion of the lead opinion to the contrary is built on sand.

My colleague begins with a discussion of *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962), which he

apparently cites as an example of the Supreme Court's rejection of the plain meaning of the statute in favor of the "overriding" purpose of the Act. Thus, my colleague implicitly concedes that, under the plain meaning of Section 33(g) and Section 2(12), the claimant in the case before us is a person entitled to compensation. Yet, my colleague reasons that this result should not govern, but, as in *Calbeck*, should yield to a different result more in line with the statutory purpose. This argument must fail because the plain meaning of Section 33(g) is identical to the congressional purpose.

My colleague's use of the *Calbeck* precedent is in error because that case involved a dichotomy between the plain language of the statute not to reach injuries covered by state law and the "overriding" congressional intent to cover all injuries incurred over navigable waters; that is, since the court had held under the maritime by local doctrine that certain injuries occurring over navigable waters were reachable by state law, the problem arose as to whether those same injuries were covered under the admiralty jurisdiction of the Longshore Act. The plain language of Section 3(a) appeared to require exclusive state coverage, contrary to the fundamental congressional purpose in enacting the Act to provide a compensation remedy for all injuries within the admiralty jurisdiction.

No such dichotomy exists in the case before us. Congress made its intention perfectly clear in 1972 when it amended Section 33(g). Prior to the 1972 amendments to the Act, Section 33(g) read,

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation

> to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made *with his written approval.*

33 U.S.C. § 933(g) (1970) (amended 1972) (emphasis added). However, with the 1972 amendments, the underlined portion of Section 33(g) was amended to read,

> . . . if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the deputy commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

If the amended language is not sufficient by itself, the text of the legislative history accompanying the amendment clearly manifests the congressional purpose in enacting the amendment.

> WRITTEN APPROVAL OF COMPROMISE SETTLEMENTS
>
> S.2318 amends Section 15(i) to make clear what Congress intended by requiring "written approval" of the employer to compromise settlements in third-party cases in order to avoid discharging the employer from further liability under this Act. Some courts have held that employers or insurance carriers are estopped to deny they have given their written approval when in fact no such written approval was given. *This amendment makes it clear precisely what written approval the person entitled to benefits must*

obtain and file with the deputy commissioner to constitute the written approval contemplated by this subsection of the Act.

S. Report No. 92-1125, 92d Cong., 2d Sess. 14 (1972) (emphasis added).

It is manifest that the Congress intended to impose strict procedural requirements for the approval of compromise settlements of third party actions. As noted by the legislative history, Congress sought to shore up the Act's requirement for "written approval," which had been eroded by the courts in situations where the employer or carrier was privy to the settlement proceedings. *See, e.g., Metropolitan Casualty Ins. Co. v. Hoage* ,89 F.2d 798 (D.C. Cir. 1937); *Lavino Shipping Co. v. Donovan,* 207 F. Supp. 178 (D. Pa. 1962). The amended version thus made it clear that written approval was specifically required. Moreover, the Board has recently agreed that the procedural requirement for written approval of compromise settlements is strict. In *Devine v. National Creative Growth, Inc.,* ____BRBS____, BRB No. 82-368 (Oct. 25, 1982) (Miller, J., responsible), a majority of the Board held that, "Section 33(g) provides a clear and precise statutory scheme which must be followed if a claimant is to obtain compensation following the settlement of a third party action." Slip op. at 8 (emphasis added). In my view, Congress expressed its clear purpose with regard to the requirement for written approval of settlements in the plain language of Section 33(g) and that purpose may not be thwarted. Where congressional intent is so explicit, there is simply no "overriding" purpose to consider. The language and the intent are one and the same.

In similar fashion, I disagree with my colleague's use of the Board's decision in *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981) as support for the proposition that the term "compensation" is so variably used in the Act that no single definition should control. It is true that in *Dunn* the question of the meaning of "time of injury" was addressed, and, because the language of the Act was insufficient, resort to the congressional intent of the entire statutory scheme was necessary. Unlike *Dunn,* in the case before us there is no variation in the ways in which the term "compensation" is used in the Act for the purpose of Section 33(g). The narrow issue before us is whether the receipt of "funeral benefits" is the receipt of "compensation." Since the definition of compensation at Section 2(12) explicitly includes funeral benefits, the issue is definitively resolved. No resort need be had to more sublime notions of congressional intent because the language of Section 2(12) spells out that intent as clear as day.

The lead opinion's use of the Board's decision in *O'Leary v. Southeast Stevedoring Co.*, 7 BRBS 144 (1977) is misguided and misleading. At the outset, it must be noted that the holding of *O'Leary* is inapposite to the case at bar. In *O'Leary*, employer refused to pay *any* compensation until an actual award was entered and the question to be resolved was whether a claimant was a "person entitled to compensation" under Section 33(g) at the time of settlement, when employer was actively contesting claimant's entitlement and had made no payments of compensation. In my opinion, it is unquestionable that employer in the case befoer us prior to the settlement proceedings voluntarily paid "compensation," is specifically defined in Section 2(12), in the form of funeral

benefits. This is not, therefore, an *O'Leary* situation, but a factual pattern recognized by *O'Leary* as requiring written consent under Section 33(g). *See* 7 BRBS at 149.

Aside from the foregoing, it is clear that certain language in *O'Leary* taken out of context, and otherwise incomplete on its own grounds, cannot rationally support my colleagues' result in the case before us. For example, the lead opinion makes much of the statement in *O'Leary* that the Act is written with the underlying concept that the employer will voluntarily begin to pay compensation. Thus, according to the lead opinion, where employer makes only small voluntary payments, the claimant is in a vulnerable fiscal position and the courts ought to ignore the congressional intent in enacting the requirements for prior written approval of settlements and, instead, permit the claimant to settle without participation by employer. Although I agree that the Act contemplates the voluntary payment of compensation without an award, I must add that the Act also contemplates the absence of voluntary payments in cases where liability is controverted by the employer. 33 U.S.C. § 914(a). The Act provides a system wherein, if liability is controverted, in whole or in part, the claims procedure is set into motion with the notice of controversion. 33 U.S.C. § 914(d). Thus, it frequently occurs that an employer will voluntarily pay some compensation, for example, a certain degree of partial disability, but will controvert claimant's asserted right to a higher degree of disability. Claimant's receipt of the voluntary payments of partial disability imposes upon him the strict requirement to obtain prior written approval from employer for any third party settlement, because the Congress imposed the written approval requirements on all "persons entitled to compensation," without regard to

the amount of compensation which they receive. 33 U.S.C. § 933(g).

It is well-established that Section 33(g) requires employer participation in the settlement proceedings so that the employer may veto settlement offers which are too low, perhaps offered for claimant's immediate gratification without due consideration for the value of the third party claim. *See Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 467 (1968). The employer clearly has a pecuniary interest in the settlement because the settlement proceeds will offset employer's liability for workers' compensation, in whatever amount finally determined. *See* 33 U.S.C. §§ 933(g), 933(f). Thus, it does not matter that the employer may be voluntarily paying only small compensation benefits; where employer voluntarily pays *any* compensation, employer is entitled to a Section 33(f) offset and must, therefore, be permitted to approve or reject all settlement agreements. I thus agree with the rationale of the District of Columbia Court of Appeals, which stated, in interpreting Section 33(g) even prior to its amendment in 1972:

> The thing petitioner did is the thing which paragraph (g) of Section 33 says cannot be done except by surrendering all further claim against the employer. The language used by Congress is so definite and unmistakable in its purpose that to read into it, as petitioner would have us, the proviso that it is to apply only if the carrier is damaged by the compromise, would be a usurpation of legislative power, and in this view it is not for us to inquire whether there is a good reason or not for desiring the rule to be as petitioner insists, for we are impelled by the plain terms of the act to apply it as it is written.
>
> * * *

> Section 33 deals exclusively with compensation for injuries where third persons are liable. It covers the whole field; and beyond all possibility of doubt subsection (g) was designed to protect the rights of an employer in the situation where the employee or his dependent, having elected to seek recovery against a third party wrongdoer, compromises the claim and releases the third party without the employer's consent. A showing of damage or of the absence of it—is beside the point in such a case. Petitioner, having compromised and settled her claim against the third party without the approval of the employer or carrier, is not now in a position to demand anything more—if for no other reason—because the statute clearly says so.

Marlin v. Cardillo, 95 F.2d 112, 114-115 (D.C. Cir. 1938). *See also Morauer & Martzell, Inc. v. Woodworth,* 439 F.2d 550, 552 (D.C. Cir. 1970), *cert. dismissed,* 404 U.S. 16 (1971).

My colleague must remain mindful that the Board sits as a quasi-judicial body empowered to resolve legal issues. *See, e.g., Ryan-Walsh Stevedoring Co., Inc. v. Trainer,* 601 F.2d 1306, 1314 n.7, 10 BRBS 852, 857-858 n.7 (1st Cir. 1979). While we are often required to interpret statutory language, where that language is clear and unambigious, we must interpret the language according to its "plain meaning." *Potomac Electric Power Co. v. Director, OWCP,* 101 S. Ct. 509 (1980). If the "plain meaning" of statutory language leads to a harsh or inequitable result, we, unfortunately, do not possess the authority to alter the statutory language nor the statutory intent. The Board is not a policymaking body. *Potomac Electric Power Co.* at 101 S. Ct. 514 n.18. It has often been said that, where Congress has put down its pen, the

courts can neither re-write Congress's words nor call it back "to cancel half a line." *Director, OWCP v. Rasmussen,* 440 U.S. 29, 47 (1979). The lead opinion attempts to avoid a harsh result by interpreting the statute in a manner that is inconsistent with the language of the statute and with the manifest congressional intent. In so doing, it has overstepped the bounds of this Board's authority. I dissent.

Dated this 30th day
of December 1982

ROBERT E. RANDALL Claimant-Petitioner v. COMFORT CONTROL, INC. and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier- Respondents	§ § § § § § § § § § §	80-912 DECISION and ORDER

Digest Section	Syllabus
701[4][b]; 702[1][a]; 702[3]; 1501; 1711	The Board affirmed the denial of permanent partial disability benefits despite a showing that claimant suffered a physically disabling back injury since claimant failed to establish a post-injury loss of wage-earning capacity. Since claimant's present employer had actively sought claimant's services and claimant had demonstrated an ability to locate jobs in his trade following his injury claimant failed to establish that his post-injury employment was due to the beneficence of his employer or that he was unable to compete on the open labor

market. Although the record contained conflicting evidence on the issue of whether claimant was earning higher wages on the same union scale than he had earned prior to his injury, the Board refused to reweigh the evidence, finding that the administrative law judge's conclusions were supported by substantial evidence.

Appeal from the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

William L. Mulroney (Ashcraft & Gerel), Washington, D.C., for the claimant.

Donald P. Maiberger (Quinn, Scanlan, Maiberger & Lockwood), Rockville, Maryland, for the employer/carrier.

(2)

No. 91-284

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY E. BARGER, PETITIONER

v.

PETROLEUM HELICOPTERS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(g), provides that the rights of a "person entitled to compensation" shall be terminated if the person settles a claim against a third person for less than the compensation payable under the LHWCA without obtaining the employer's prior written approval. The question presented is whether the termination-of-rights provision applies when the person who settles the claim without employer approval is not, at the time of the settlement, receiving compensation from his employer and has not then been determined to be entitled to it.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 74a-86a) is reported at 927 F.2d 828. The panel opinion of the court of appeals (Pet. App. 71a-73a) is reported at 910 F.2d 276. The decision and order of the Benefits Review Board (Pet. App. 65a-70a) and the decision and order of the administrative law judge (ALJ) (Pet. App. 48a-64a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1991. The petition for a writ of certiorari was filed on June 27, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) requires employers to pay compensation to covered workers and their survivors for work-related injuries that result in disability or death, see 33 U.S.C. 908, 909, and to provide medical services for covered injuries. 33 U.S.C. 907. A "person entitled to * * * compensation" under the LHWCA, however, may also recover damages from a third person. 33 U.S.C. 933(a). If the person does so recover, the employer receives a credit against the LHWCA compensation to the extent of the employee's "net" recovery against the third party (defined as the employee's actual recovery less reasonable expenses including attorney's fees). See 33 U.S.C. 933(f).[1]

Section 33(g)(1) of the LHWCA provides a special rule for cases in which "the person entitled to compensation" settles the third-party action for less than the amount of compensation to which the person would be entitled under the LHWCA. 33 U.S.C. 933(g)(1). In such cases, the employer is liable for the difference between the settlement and the LHWCA compensation due "only if written approval of the settlement is

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[1] The LHWCA also provides a mechanism for an employer that is required to pay compensation to assert the employee's third-party claim if the employee does not. If the employee accepts an award of compensation and does not assert the third-party claim within six months, the employer may, within 90 days thereafter, sue the third person on assignment of the employee's cause of action. 33 U.S.C. 933(b) and (d). From any recovery (net of attorney's fees and costs), the employer is entitled to recoup its payments to the employee and to retain the present value of estimated future compensation payments. See 33 U.S.C. 933(e).

obtained from the employer and the employer's carrier, before the settlement is executed." *Ibid.* In addition,

> [if] no written approval of the settlement is obtained and filed as required by [Section 33 (g)(1)], or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under [the LHWCA] shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under [the LHWCA].

33 U.S.C. 933(g)(2).

2. On April 23, 1976, Walter Barger died while piloting a helicopter in the Gulf of Mexico. His employer, Petroleum Helicopters, Inc. (PHI), and its insurer, American Home Assurance Company, initially paid LHWCA death benefits to Barger's widow, Mary E. Barger. The employer stopped payments on April 17, 1978, when Mrs. Barger filed suit against PHI and the manufacturer of the helicopter under the Jones Act, 46 U.S.C. App. 688.[2] Pet. App. 2a, 49a, 66a.

On September 9, 1980, on the eve of trial, Mrs. Barger and the manufacturer agreed that if a judgment was entered against the manufacturer, it would pay Mrs. Barger $225,000 and waive its right to appeal. Pet. App. 29a n.1, 51a. PHI, which had been

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[2] The Jones Act remedy is limited to "seamen" and is exclusive of the remedy provided by the LHWCA. Thus, if Mrs. Barger was entitled to compensation under the Jones Act, she was not entitled to compensation under the LHWCA. See generally *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 813-814 (1991) (discussing relationship between Jones Act and LHWCA).

informed of ongoing settlement negotiations, did not approve this agreement. *Id.* at 51a-52a. The trial court awarded a total of $660,368 to Mrs. Barger, apportioned 20% ($132,073.60) against the manufacturer, and 80% ($528,294.40) against PHI, with neither defendant being entitled to contribution or indemnity. *Id.* at 8a, 24a. On PHI's appeal, the Fifth Circuit determined that Mrs. Barger's deceased husband had not been a seaman, and that she accordingly was entitled to relief under the LHWCA rather than the Jones Act. *Id.* at 27a-44a.

3. Following the court of appeals' decision, Mrs. Barger sought renewed compensation from PHI under the LHWCA. See Pet. App. 73a. PHI argued that Section 33(g) protected it from liability because Mrs. Barger had not obtained PHI's prior written approval before entering into her agreement with the manufacturer. Relying on decisions issued by the Benefits Review Board and other ALJs, the ALJ held that Section 33(g) did not require consent because Mrs. Barger was not a "person entitled to compensation" at the time of settlement. Pet. App. 52a-61a. He reasoned that under Section 33(g)(1), as amended in 1984,[3] Congress preserved the established administrative construction of an earlier version of Section 33(g) that a person who is not receiving benefits at the time of settlement is not a "person entitled to compensation" who must obtain an employer's consent. Pet. App. 55a-57a. The ALJ thus found it unnecessary to decide whether Mrs. Barger's agreement with the manufacturer was a compromise or settlement for which approval was required. *Id.* at 61a. The Benefits Review Board affirmed, agreeing

[3] See Pub. L. No. 98-426, § 21(d), 98 Stat. 1652 (1984), adding Section 33(g)(2), quoted at page 3, *supra*.

with the ALJ that Mrs. Barger was not a "person entitled to compensation" at the time she entered her agreement. *Id.* at 65a-70a.

4. A panel of the court of appeals reversed, relying on the reasoning of its previous decision in *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552 (1990), aff'd on reh'g, 927 F.2d 828 (5th Cir. 1991) (en banc), which had held in a similar case that an employer is not liable for the difference between the settlement and LHWCA compensation unless it consents to the third-party settlement, even if the employee was not receiving compensation at the time of the settlement. See Pet. App. 73a; 907 F.2d at 1554-1555.

5. To resolve a conflict with the court's earlier unpublished decision in *Kahny* v. *Director, OWCP*, 729 F.2d 777 (5th Cir. 1984) (Table), the court of appeals granted the suggestions for rehearing en banc filed by petitioner and the Director of the Office of Workers' Compensation Programs,[4] and affirmed the panel decision. Pet. App. 76a, 83a.[5] Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that Section 33(g) unambiguously requires an em-

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[4] Under Section 39(a) of the LHWCA, "the Secretary [of Labor] shall administer the provisions of this chapter." 33 U.S.C. 939(a). The Secretary has assigned that administrative responsibility to the Director. 20 C.F.R. 802.410(b). See *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 302 n.9 (1983). The Director participated as a respondent in the court of appeals.

[5] The court also granted rehearing en banc in a companion case raising the same issue, *Nicklos Drilling Co.* v. *Cowart*, 907 F.2d 1552 (5th Cir. 1990), and similarly affirmed the decision vacating the Board's order. See Pet. App. 77a, 83a. The claimant's petition for certiorari in that case is pending as *Estate of Cowart* v. *Nicklos Drilling Co.*, No. 91-17.

ployer's prior written approval of settlements for less than the compensation due, whether or not a claimant is receiving LHWCA compensation at the time of settlement. The court therefore refused to defer to the Director's contrary interpretation. Pet. App. 79a-82a.

For three reasons, the court rejected the Director's argument that "[t]he actual payment of benefits * * * is the price which Congress intended employers to pay for the right of prior approval." Pet. App. 78a. First, the court found no textual exceptions to the approval requirement set forth in Section 33. Pet. App. 81a. Second, the court pointed out that Section 33(g)(2) terminates benefits for noncompliance "regardless of whether the employer * * * has made payments or acknowledged entitlement to benefits under this chapter," 33 U.S.C. 933(g)(2); that provision, the court stated, "squarely refutes" the Director's argument that the employer's actual payment of benefits was intended to be the *quid pro quo* for the employer's right of prior approval. Pet. App. 81a. Finally, the court saw no need to accept the Director's reading of Section 33(g) in order to prevent financial hardship to claimants pursuing civil remedies. Any hardship on claimants, the court indicated, was a "self-inflicted" result of their decision "to ignore their rights and responsibilities" under 33 U.S.C. 933(g). Pet. App. 82a.

The court also rejected the Director's claim that his interpretation is necessary to give meaning to the requirement in Section 33(g)(2) that "employees" must notify their employers of "any settlement obtained from or judgment rendered against a third person." 33 U.S.C. 933(g)(2). The Director argued that if the approval requirement were applied to all

settling claimants, including those who were not receiving benefits, the notice provision would be superfluous because the employer would be aware of all settlements from having approved them.[6] The court, however, stated that the quoted phrase in Section 33(g)(2) not only "extends the notification requirement to judgments," but also applies to settlements "for an amount exceeding [a claimant's] LHWCA compensation entitlement." The approval requirement, in contrast, applies only to settlements for less than a claimant's LHWCA compensation entitlement. Thus, the court did not believe that its interpretation rendered the notice requirement superfluous. Pet. App. 82a.

Finding that "Congress has spoken unambiguously" in requiring all employees to obtain prior approval, the court concluded that the Director's interpretation of the statute was not entitled to deference. Pet. App. 83a.

Three judges dissented. Pet. App. 83a-86a. They found the Director's interpretation of "person entitled to compensation" reasonable and entitled to deference. In particular, the dissenters saw no valid reason why an employee who has been denied compensation must "go hat in hand to the employer and request permission to settle his claim"; such a result would serve only to foreclose a legitimate compen-

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[6] The Director argued (C.A. Supp. Br. 19) that Section 33(g) distinguishes between two kinds of settlements for less than the amount of LHWCA compensation: those where a claimant was receiving benefits at the time of settlement and those where he was not. According to the Director, the former class, constituting "person[s] entitled to compensation," is governed by Section 33(g)(1)'s approval requirement; the latter need only satisfy Section 33(g)(2)'s notification requirement.

sation claim. *Id.* at 85a. The dissent also found no evidence that Congress intended to overrule the Director's interpretation when it added Section 33(g)(2) in the 1984 LHWCA amendments; rather, the dissent interpreted Congress's reenactment of the phrase "person entitled to compensation" as approval of the administrative and judicial construction, and agreed with the Director that Section 33(g)(2)'s notification requirement "adds to the force of the Director's construction" by requiring notification but not approval whether compensation is being paid or not. Pet. App. 86a.

ARGUMENT

Estate of Cowart v. *Nicklos Drilling Co.*, No. 91-17, which seeks a writ of certiorari from the same judgment as this petition, also seeks review of the question presented here, whether Section 33(g) of the LHWCA requires an employer's written approval of a third-party settlement for less than the compensation due, even when the employee is not receiving LHWCA compensation.[7] As we discussed in our brief in opposition to the *Cowart* petition,[8] we believe that this issue is not ripe for review at this time. In particular, for the reasons stated in our *Cowart* opposition, we disagree with petitioner's argument (Pet. 23-24) that the court's decision conflicts with *Bethlehem Steel Corp.* v. *Mobley*, 920 F.2d 558 (9th Cir.

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[7] As discussed above, it also is disputed in this case whether Mrs. Barger's agreement with the manufacturer was a "settlement" subject to Section 33(g)'s approval requirement. Although the question presented may be read to include this issue, petitioner presents no argument on it.

[8] We have served a copy of our response in *Cowart* on the parties to this petition.

1990), and *O'Leary* v. *Southeast Stevedoring Co.*, 7 Ben. Rev. Bd. Serv. (MB) 144 (1977), aff'd mem., 622 F.2d 596 (9th Cir. 1980) (Table). See 91-17 Br. in Opp. 9-11. We also question petitioner's assessment of the impact of the court's decision on past, pending, and future LHWCA claimants. See Pet. 24-26; 91-17 Br. in Opp. 11-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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(3)

NO. 91-284

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARY E. BARGER,
Plaintiff-Petitioner

v.

PETROLEUM HELICOPTERS, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Defendants-Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the appellate court correctly held that there is no exception to Section 33(g) of the Longshore and Harbor Workers' Compensation Act requiring that all claimant settlements with third-persons which expose the claimant's employer to further compensation payment must have the written approval of the employer and the compensation insurance carrier to avoid ending the claimant's entitlement to compensation.

LIST OF PARTIES

The undersigned counsel of record for Petroleum Helicopters, Inc. and American Home Assurance Company, defendants/respondents herein, certify that the following parties have an interest in the outcome of this case:

1. Mary E. Barger -Plaintiff/Petitioner
2. Mary Ellen Blade - Attorney for Plaintiff/Petitioner
3. Hubert Oxford, III - Attorney for Plaintiff/Petitioner
4. Petroleum Helicopters, Inc. - Defendant/Respondent
5. American Home Assurance Company - Defendant/Respondent
6. Vance E. Ellefson - Attorney for Defendants/Respondents
7. C. Theodore Alpaugh, III - Attorney for Defendants/Respondents
8. United States Department of Labor, Office of Workers Compensation
9. Samuel J. Oschinsky - Attorney for the Department of Labor
10. Donald Shire - Attorney for Department of Labor
11. Benefits Review Board
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No. 91-284

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MARY E. BARGER,
Plaintiff-Petitioner

v.

PETROLEUM HELICOPTERS, INC.
and
AMERICAN HOME ASSURANCE COMPANY,
Defendants-Respondents

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Justices Of The Supreme Court Of the United States of America:

JURISDICTION

The opinions and judgment of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*,, were rendered in this case on March 29, 1991. The Petition for Writ of Certiorari was docketed on June 29, 1991. The Petition for Writ of Certiorari was filed on June 27, 1991.

STATUTE INVOLVED

33 U.S.C. §933(g):

(g) Compromise obtained by person entitled to compensation.

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and employer's carrier, before the settlement is executed and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

STATEMENT OF THE CASE

Walter Barger was killed in April, 1976, when the helicopter he was piloting crashed on a flight between platforms fixed to the seabed of the Outer Continental Shelf in the Gulf of Mexico. Mr. Barger was employed by Petroleum Helicopters, Inc. (hereinafter "PHI") which, after his death, voluntarily instituted payment of Longshore and Harbor Workers' Compensation Benefits to

his widow and children. Mrs. Barger subsequently filed suit against Bell Helicopter Textron (hereinafter "Bell"), the manufacturer of the helicopter, and PHI. Her theory of liability against PHI was that the helicopter was a "vessel" and that Mr. Barger was a "seaman" within the meaning of the Jones Act.[1]

Upon institution of the suit, Mrs. Barger's counsel was advised that Longshore benefits were being paid but that, if the Bargers were contending that Mr. Barger was a "seaman", Longshore benefits were not due and would be terminated. Counsel replied that the plaintiff's position was that Mr. Barger was a "seaman" and that he was covered by the Jones Act. Longshore benefits were then discontinued.

On the eve of trial, Bell and the plaintiff settled their claims.[2] In return for release from all liability, Bell agreed that, if cast in judgment, it would pay Mrs. Barger $225,000.00. In turn, Mrs. Barger agreed not to execute any judgment against Bell or to seek anything over the amount agreed. Bell's counsel was present at trial but took virtually no part in the proceedings. Bell and PHI were cast in judgment by the district court, which held the aircraft to be a "vessel" and Mr. Barger a "Jones Act seaman." Damages in the amount of $660,368.00 were assessed, with Bell bearing 20%, or $132,073.60.[3]

PHI appealed to the United States Court of Appeals

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[1] 46 U.S.C. §688.

[2] *Barger v. Petroleum Helicopters, Inc.*, 514 F. Supp. 1199 1212, f.n. 32 (E.D. Tx. 1981). Petitioner, on page 5, has cited the judgment entered on April 19, 1983, to establish that settlement was entered into *after* trial. However, in his original opinion on May 21, 1981, Judge Fisher correctly found that settlement was entered into *prior* to trial.

[3] *Id.*

for the Fifth Circuit which reversed the finding that the helicopter was a "vessel" and that Mr. Barger was a "Jones Act seaman."[4] Bell paid Mrs. Barger in accordance with the settlement agreement, receiving a full release of all liability.

On December 12, 1982, Mrs. Barger instituted a claim against PHI under the Longshore and Harbor Workers' Compensation Act,[5] (hereinafter "LHWCA"), claiming she had exhausted any credit for the settlement with Bell. PHI opposed the claim on the basis that Mrs. Barger's settlement with Bell was a compromise within the meaning of §33(g) of the Act to which PHI, the employer, had not agreed.[6] The Deputy Commissioner, however, awarded compensation benefits to Mrs. Barger, on the basis that Mrs. Barger was not a "person entitled to compensation" at the time of the compromise. An Administrative Law Judge held that PHI was barred from raising the compromise between Bell and the plaintiff.[7] The Benefits Review Board affirmed the Administrative Law Judge.[8] PHI appealed the decision and the Fifth Circuit reversed,[9] for the reasons stated in its opinion in

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[3] *Id.*

[4] *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. den.*, 461 U.S. 958, 103 S. Ct. 2430, 77 L. Ed. 2d 1316 (1983).

[5] 33 U.S.C. §901, *et seq.*

[6] 33 U.S.C. §933(g) (hereinafter "33(g)").

[7] *In the Matter of Walter Barger, Deceased Claimant v. Petroleum Helicopters, Inc., Employer and American Home Assurance Company, Carrier,* case No. 87-LHC-597, OWCP No. 73-9001 (Nov. 18, 1987), Appendix "D" to Petition for Certiorari.

[8] *Mary E. Barger, Widow of Walter Barger v. Petroleum Helicopters, Inc. and American Home Assurance Co.*, Decision and Order, BRB No. 88-101 (Nov. 22, 1989), Appendix "E" to Petition for Certiorari.

[9] *Petroleum Helicopters, Inc. v. Barger*, 910 F.2d 276 (5th Cir. 1990).

Nicklos Drilling Co. and Compass Insurance Co. v. Cowart,[10] which was consolidated with *Barger* for rehearing en banc. On March 29, 1991, the Fifth Circuit affirmed the panel opinions in both cases, holding Section 33(g)'s requirement of prior written approval applies regardless of whether or not the employer/carrier is paying LHWCA benefits at the time of the settlement.[11]

REASONS FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

I. THE APPELLATE COURT PROPERLY HELD THAT THERE ARE NO EXCEPTIONS TO THE WRITTEN APPROVAL REQUIREMENT OF §33(g).

There is no dispute that Petitioner in this case entered into a settlement agreement with Bell. There is no dispute that the settlement agreement in question was made without the approval of PHI. Nor is there any dispute that the settlement agreement was for *less* than the compensation to which Mrs. Barger would have been entitled. The sole question before this Court is really whether there is any exception whatsoever to the written approval requirement of §33(g), where the settlement is for an amount less than the compensation to which the claimant would otherwise be entitled.

Petitioner argues that this Court should follow an administrative interpretation of §33(g) which, if allowed to stand, would completely ignore the clearly expressed Con-

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[10] 907 F.2d 1553 (5th Cir. 1990).

[11] *Nicklos Drilling Co. v. Cowart,* 927 F.2d 828 (5th Cir. 1991).

gressional intent of the pertinent provisions of the LHWCA, decisions by appellate courts on this issue and the plain meaning of the words of the statute. An examination of the history of the LHWCA in general, and §33(g) in particular, clearly shows the error of Petitioner's contentions.

§33(g), as enacted in 1927 as part of the Longshoremen's and Harbor Workers' Compensation Act, read:

> If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representation would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.[12]

The incorrect reference in §33(g) to "subdivision (e)" was changed in 1959 to "subdivision (f)".[13]

Prior to 1970, the courts strictly enforced §33(g). Reading the statute as written, mere discontinuance or abandonment of a third-party claim by an employee was held not to discharge the employer's liability for compensation, in the absence of prejudice to the employer.[14] However, when a third-party claim was actually settled

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[12] Longshoremen's Act of 1927, Ch. 509, §33(g), 44 Stat. 1440.

[14] Longshoremen's Act Amendments of 1959, Pub. L. No. 86-171, §33(g), 73 Stat. 391, 392. Subdivision (f) requires the employer to pay the difference between the amount received from the third-party compromise and the amount of compensation due under the Act, if greater than the amount received from the third-party.

14 *Chapman v. Hoage*, 296 U.S. 526, 56 S. Ct. 333, 80 L.Ed 370 (1936); *American Lumbermen's Mut. Cas. Co. v. Lowe*, 70 F.2d 616, 618 (2d Cir. 1934).

without obtaining the employer's consent, the federal courts refused to read any requirement of prejudice into §33(g) and enforced it strictly according to its terms.

> Section 33 deals exclusively with compensation for injuries where third-persons are liable. It covers the whole field; and beyond all possibility of doubt subsection (g) was designed to protect the rights of an employer in the situation where the employee or his dependent, having elected to seek recovery against a third-party wrongdoer, releases the third-party without the employer's consent. A showing of damage - or the absence of it - is beside the point in such a case. Petitioner, having compromised and settled her claim against the third-party without the approval of the employer or carrier, is not now in a position to demand anything more - if for no other reason thanbecause the statute clearly says so.[15]

The Fourth Circuit has recognized that the purpose of §33(g) was to prevent an employee or his beneficiaries from independently managing pending litigation or affecting the course of prospective litigation designed for the use of the employer as well as the employee or his dependents.[16]

> Where ... there has been a judicial determination of the damages, there is no possibility whatsoever of prejudice to the employer from the judgment creditior's subsequent consent to a diminution in payment. The employer has no interest in it. The reduction is at the plaintiff's sole expense *and does not lessen the employer's right of set-off,* and the employer and his insurance carrier are not otherwise affected. The situation does not fall

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[15] *Marlin v. Cardillo,* 95 F.2d 112, 115 (D.C. Cir. 1938).

[16] *Bell v. O'Hearne,* 284 F.2d 777 (5th Cir. 1960).

within the purpose of §933(g).[17]

The employer and carrier were still entitled to credit for the full amount of the judgment. Recovery of the difference between that amount and the compensation due under the Act was not precluded by the failure to obtain the employer's consent to the discount.[18]

An employee's survivor's acceptance of a remittitur of a judgment to avoid a new trial did not constitute a "compromise":

> An order of remittitur is a judicial determination of recoverable damages; it is not an agreement among the parties involving mutual concessions. §33(g) protects the employer against his own employee's accepting too little for his cause of action against a third-party. That danger is not present when damages are determined, not by negotiations between the employee and the third-party, but rather by the independent evaluation of a trial judge.[19]

The settlement recommendations of a trial judge, when accepted by the parties in a third-party claim and reduced to a consent judgment was held to be a private compromise rather than a judicial determination. The consent judgment did not result from the Judge's independent finding of value after a full presentation of the evidence,

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[17] *Id.* at 780 (emphasis added), *see e.g., Edmond v. Compagnie General Transatlangigue*, 443 U.S. 459, 99 S. Ct. 2753, 61 L.Ed. 2d 521 (1979), under which claimant's claim would be premature because the proper credit is based on the total judgment of $660,368.00, and not claimant's compromise.

[18] *Id.* at 781.

[19] *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 88 S. Ct. 1140, 1145, 20 L.Ed 2d 30 (1968).

but was a suggested figure which the parties were free to accept or reject. Where the employer's written consent to the compromise figure had not been obtained, the employer was not obligated to pay compensation.[20]

A series of decisions began to undermine this interpretation of §33(g). In *Robinson Terminal Warehouse Corp. v. Adler,*[21] an employer's insurer which was also the carrier for the third-party defendant vessel was held to have approved a compromise and was estopped from relying on §33(g) when it issued its "written" draft in payment of the agreement settlement figure. Congress eliminated such "estoppel" decisions by amending the Act for the first time since its enactment forty-five years earlier. The 1972 Amendment to the Act changed §33(g) to read as follows:

> If a compromise with such third-person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if the *written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of, or prior to, such compromise on a form provided by the Secretary and filed in the office of the Deputy Commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.*[22]

With the 1972 Amendments, a check issued by the

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[20] *Morauer & Hartzell, Inc. v. Woodworth,* 439 F.2d 550 (D.C. Cir. 1970), *cert. dis.,* 404 U.S. 16, 92 S. Ct. 170 (1971).

[21] 440 F.2d 1060 (4th Cir. 1970).

[22] Longshoremen's Act Amendments of 1972, Pub. L. 91-576, §15(h), 86 Stat. 1251, 1262. The language added by the 1972 Amendment is underlined.

employer's insurer would no longer be considered "written approval." Approval had to be on a Department of Labor form, filed with the Office of Workers' Compensation Programs. The employer's or insurer's knowledge of or participation in the third-party settlement would not create estoppel. The employee was affirmatively required to obtain written approval on a specified form. A third-party insurance carrier would no longer be able to dispense with the employer's right to approve the settlement, even where the carrier also insured the employer. The approval of the employer and its carrier was required. Approval by the employer now had to be obtained at a specific time in the settlement process ("at the time of, or prior to such compromise") and filed within a specific time afterwards ("within thirty days after such compromise is made").

In 1977, the Benefits Review Board began what has every appearance of a concerted attempt to do away with §33(g). In *O'Leary v. Southeast Stevedore Co.*,[23] the Board began its work to create its own definition of "person entitled to compensation" thereby virtually eliminating the effect of §33(g). In *O'Leary,* an Administrative Law Judge determined that, because the employer had "never paid compensation voluntarily or pursuant to an award prior to the third-party settlement"[24] the claimant survivor was not a "person entitled to compensation" at the time of the settlement and was thus not required to obtain the employer's consent under §33(g). *O'Leary* purported to read §33(g) "in line with the humanitarian and beneficent purposes of the Act", which had been:

> Clearly written with the underlying concept that the employer upon being informed of an injury will voluntarily begin to pay compensation.[25]

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[23] 7 BRBS 145.

[24] 7 BRBS 148.

[25] *See* 33 U.S.C. §914(a).

> The provisions of §33 similarly contemplate either payments being made voluntarily or pursuant to an actual award.[26]

The Board argued that requiring written consent to be obtained from an employer who had not paid benefits prior to a settlement "'could severely prejudice a claimant's rights.''[27] The Board went on to state:

> [A] claimant not being paid any compensation ... would be afraid to make a third-party settlement for in doing so he might waive his rights to compensation under the Act. Ultimately, a claimant going without income for a long enough time could be forced into a third-party settlement without the employer's consent to obtain money ... Surely, Congress by requiring written consent could not have contemplated such a result.[28]

The Board's decision in *O'Leary* substitutes a phrase cast in the past tense for a phrase denoting future expenctancy. The Board substitutes in the statute for the language "person entitled to compensation", the phrase "person paid compensation voluntarily or pursuant to an award prior to the third-party settlement." The Board's sleight of hand not only flies in the face of English usage, it contradicts the Board's own statements in other cases. In 1978, the Board had no difficulty differentiation between "language of entitlement" and language of "actual receipt." Reviewing portions of the House and Senate Committee Reports on the 1972 Amendment to §8(d) of the Act, the Board stated:

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[26] 7 BRBS at 147.

[27] 7 BRBS at 149.

[28] *Id.*

> [t]he analysis of the 1972 Amendment contained in [the] Senate Report ... uses language of entitlement, not of actual receipt.
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> > Section 8(d) of the Act ... is amended to provide for payment of survivor benefits in situations where a worker who *is entitled to benefits* for permanent partial disability dies from causes other than the injury.[29]
>
> The House Committee ... likewise speaks of entitlement to disability payments with no mention that the decedent must be actually receiving permanent partial compensation.[30]

Similar interpretations of "language of entitlement" appear in Federal decisions reported both before and after Congress drafted the Longshoremen's Act of 1927.[31] More recent cases have addressed the same question in a similar manner.[32]

O'Leary makes no reference to prior Second, Fourth and Sixth Circuit cases interpreting the phrase "entitled to compensation." These cases addressed the relationship of §33 with §44 of the Act.[33] Under §33(c), the §44(c) payment effected an immediate assignment of the third-party cause of action for the death of an employee for which no

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[29] Emphasis added.

[30] *Acuri v. Cataneo Lines Service Co.*, 8 BRBS 102, 111 (1978).

[31] In *Hibberd v. Slack*, 84 Fed. 571, 579 (C.C. S. D. Cal. 1897)

[32] *Merrill v. United States*, 338 F.2d 372, 375-76 (Ct. C.L. 1964); *McMillen v. Califano*, 443 F.Supp. 1362, 1367 (C.O.N.Y. 1978).

[33] §44(c) of the Act, 33 U.S.C. §944(c), requires payment by the employer into a special trust fund whenever the Department of Labor:

> determines that there is no person entitled under this Act to compensation for the death of an employee which would otherwise be compensable under the Act.

person is entitled to collect compensation from the decedent's representative to the employer. These cases are impossible to reconcile with *O'Leary*.

Branham v. Terminal Shipping Co.[34] is a Fourth Circuit case in which the employer was ordered to make a §44(c) payment. The deceased employee's surviving representative had settled her third-party death claim for more than the maximum compensation to which she was entitled under the Act. The effect of the settlement was to simultaneously extinguish any entitlement to compensation and any cause of action which could have been assigned to the employer under §33(c).

The argument put forward against the employer was that the effect of the settlement was to create a situation in which there was no longer any "person entitled to compensation" and the §44(c) payment was therefore required.

The employer argued that entitlement to compensation was determined prospectively at the time of injury (or death entitling the dependent to death benefits), not at the time the question of entitlement was resolved by an Administrative Order.

Relying in part on a Second Circuit ruling,[35] the Fourth Circuit held:

> [i]t is not to be presumed that Congress intended in enacting the Longshoremen's Act that the question of whether there was any person entitled to compensation should be determined by any act of a dependent, such as the election of the mother in this case, or in any way other than by consider-

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[34] 136 F.2d 655 (4th Cir. 1943).

[35] *Federal Mut. Liab. Ins. Co. v. Locke*, 60 F.2d 895 (2d Cir. 1932).

> ing the facts that existed at the time of the injury to the employee.[36]

It is clear that Congress intended non-paying employers to receive the benefit of §33 from the inception of the Act in 1927. As originally enacted in 1927, §33(a) contained the "person entitled to compensation" language still present today.

> If on account of a disability or death for which compensation is payable under this Act, *the person entitled to* such *compensation* determines that some person other than the employer is liable in damages, he may elect, by giving notice to the Deputy Commissioner in such manner as the Commission may provide, *to receive such compensation or to recover damages against such third-person.*[37]

Under the 1927 Act, acceptance of compensation operated immediately to assign to the employer "all rights of the *person entitled to compensation* to recover damages against such third-person, whether or not the *person entitled to compensation* has notified the Deputy Commissioner of his election."[38] A claimant could not accept compenation and at the same time retain the right to pursue and compromise a third-party action. However, §33(g), from 1927 to the present time, has always required the same "person entitled to compensation" to abtain the

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[36] At 136 F.2d 655. *See also, Reiss Steamship Co. v. Cyr,* 138 F. Supp. 834 (M.D. Ohio 1954), *aff'd.* 229 F.2d 849 (6th Cir. 1956), decided under the 1938 version of §33(f), holding that entitlement as used in the phrase "person entitled to compensation" is determined that the time of the claimant's election to sue the third-party, not at some later time when the right to deficiency compensation is ajudicated.

[37] Longshoremen's Act of 1927, Ch. 509, §33(a), 44 Stat 1440 (emphasis added).

[38] *Id.* §33(b) (emphasis added).

employer's written approval in order to preserve the §33(f) right to an award of compensation above and beyond the third-party recovery.

In 1938, §33(b) of the Act was amended, in the words of Congress:

> to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of §33 in making the mere acceptance of compensation work automatically an assignment to the employer off rights of action against the third-party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third-party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the Deputy Commissioner, thus giving opportunity to the injured person, or to the injured person in case of death to consider the acceptence of compensation from the employer with the resulting loss of right to bring suit and damages against the third-party, or a refusal of compensation so as to pursue the remedy against the third-party, alleged to be liable for the injury.[39]

The amended §33(b) provided:

> Acceptance of such compensation under an award in a compensation order filed by the Deputy Commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third-person.[40]

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[39] H.R. Rep. No. 1945, 75th Cong. 3d Sess. 9 (1938).

[40] Longshoremen's Act Amendments of 1938, Ch. 685, Sec. 12, 52 Stat. 1164, 1168.

As long as a claimant accepted voluntary payment without an award, he preserved his option to pursue the third-party claim. Once the claimant elected to pursue the third-party claim under §33(a), compensation ceased as §33(a) was unchanged by the 1938 Amendments. If the employer refused voluntarily to pay and a claimant obtained compensation under an award, the §33(b) assignment took effect, precluding a third-party action by the claimant. Here, again, a "person entitled to compensation" in a position to compromise a third-party suit could not be receiving compensation either voluntarily or pursuant to an award at the time of settlement. *Nevertheless, §33(g) still required the employee to obtain the non-paying employer's written consent to the compromise.*

Section 33 was amended again in 1959. Section 33(g) remained unchanged except to correct the erroneous reference to subdivision (e).[41] Congress removed the §33 (a) election from the Act. The House report stated:

> In such a case, that is, injury through a third-party, under the present statute [the worker] or his survivors are obliged to elect either to receive compensation or to sue the third-party. Many times, in spite of the fact that they have a good cause of action and could receive a greater sum of money against the third-party, they are afraid to do so because in the event of the loss of the case, they would then have neither recovery in that suit nor the compensation. A further evil sometimes occurs when these people find it necessary to practically sell their claim in order to obtain support during the course of the case.[42]

Under the amended §33(a), acceptance of compensation

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[41] See fn. 13.

[42] H.R. Rep. No. 229, p. 2.

under an award no longer created an immediate assignment to the employer of the third-party cause of action[43]. Assignment occurred six months after an award unless the claimant had commenced a third-party suit.[44]

The 1959 Amendment did not change the "person entitled to compensation" wording found in §33. Petitioner contends that it is "black letter law" that in enacting or amending statutes, Congress is held to have considered the existing judicial interpretations of statutory language. Petitioner and the BRB, however, ignore the judicial interpretation in *Branham* and related cases construing the entitlement conferred by the phrase "person entitled to compensation" in relation to facts existing *at the time of the injury,* which was then "and for some time thereafter" the existing interpretation.[45]

For the first time in the thirty-two year history of the Act, it was possible for a "person entitled to compensation" to receive compensation while pursuing a third-party claim. There has been no direct effect on §33(g) by the 1959 Amendments. However, the changes to other subdivisions of §33 meant that claimants settling third-party suits would now, for the first time, be required to obtain approval from the class of employers paying compensation. *Approval by the class of non-paying employers continued to be required as it had for the previous thirty-two years.*

A person's "entitlement to compensation" under the Longshore Act is not subject to an employer's determination of whether to pay or controvert the claim. Nor is the claimant's §33(g) obligation to obtain approval of a settle-

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[43] Longshoremen's Act Amendment of 1959, Pub. L. No. 86-171, §33(a), 73 Stat. 391.

[44] *Id.* §33(b).

[45] At 136 F.2d 655.

ment dependent on whether or not the employer is paying compensation at the time. Section 14(a) of the Act affords the employer the right to controvert a claim within fourteen days of "knowledge of the alleged injury or death" in accordance with §14(d). The Fifth Circuit has recognized that the Act encourages the voluntary payment of benefits in order to accomplish its purpose to assure prompt aid to an employee when his need is greatest.[46] However, the Fifth Circuit has also recognized the right of an employer to controvert a claim and the existence of administrative procedures for doing so.[47]

Subsequent to the Board's decision in *O'Leary*, the 1984 Amendments to the Longshore and Harbor Workers' Compensation Act were passed.[48] Prior to the Amendments, the entirety of §933(g) read as follows:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) of this section only if the written approval of such compromise is obtained from the employer and its insurance carrier by the person entitled to compensation or such representative at the time of or prior to such compromise on a form provided by the Secretary and filed in the office of the Deputy Commissioner having jurisdiction of such injury or death within thirty days after such compromise is made.

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[46] *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975).

[47] See §914(d); 20 C.F.R. 702 (1984). *See also, Peters v. North River Ins. Co. of Morristown, New Jersey*, 764 F.2d 306 (5th Cir. 1985).

[48] Public law 98-426 (September 28, 1984).

Section 21(d) of the 1984 Amendments to the LHWCA altered §933(g) to its present form. These amendments were initially interpreted by the Board in *Dorsey v. Cooper Stevedoring Co.*[49] Despite the obvious changes in the statute, the Board chose to read each subsection of §33(g) as a separate provision having no relation to the other.[50] The Board's interpretation distinguished between a "person entitled to compensation" under subsection (1), where formal approval of the settlement was required, and a person not entitled to compensation under subsection (2), where mere notice of the settlement would suffice.[51] The Board attempted to support its interpretation by stating that the Legislative history" ... contains nothing conclusive regarding the changes in Section 33(g)."[52] The Board went on to state that it felt that subsection (g)(2) would otherwise be rendered superflous:

> If subsection (g)(2) were interpreted to require written notice regardless of whether claimant was receiving compensation at the time of the third-party settlement, as employer argues, the phrase requiring notice of any settlement or judgment would be rendered superflous since the written approval requirement makes any additional notification unnecessary.[53]

The Board further believed that its holding that the necessity for written approval arose only when compensation is being paid was consistent with policy concerns.[54]

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[49] 18 BRBS 25 (1986).

[50] *Id.* at 29.

[51] *Id.*

[52] *Id.* at 30, n. 7.

[53] *Id.*

[54] *Id.* at 31.

However, this interpretation disregards the point raised with regard to the 1959 Amendments which allowed a "person entitled to compensation" to pursue a third-party claim for the first time. At the same time, the 1959 Amendments continued, without change, the requirement of approval by non-paying employers.

The Board's holding, essentially, is that the statute as written does not make sense. Contrary to the assertions of the Board, the Legislative history of the 1984 Amendments clearly shows the intent of Congress in amending §933(g):

> Section 19 amends Section 33 of the Act ... This Section further provides that if a claimant who has brought a cause of action against a third-party has entered into a settlement in an amount less than the amount to which the claimant would be entitled under the Longshore Act, the employer shall be responsible for additional compensation *only* if the employer has approved the settlement agreement.[55]

Unlike the Benefits Review Board, the Fifth Circuit, in its published opinions on the subject, found the intent of Congress to be quite easily ascertainable. In the first opinion on the issue, *Petroleum Helicopters, Inc. v. Collier,*[56] the court spoke to the issue of the revised §933(g) and stated:

> We ... note that the legislative history of the 1984 Amendments to the LHWCA admits no exception to the written approval requirement.[57]

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[55] H.R. Rep., No. 98-570, p. 1, 98th Congress, 2 Sess. 30-31, *reprinted in*, [1984] U.S. Code Cong. & Ad. News, 2734, 2763-64 (Emphasis added).

[56] 784 F.2d 644 (5th Cir. 1986).

[57] *Id.* at 644.

In *Collier,* the Fifth Circuit clearly viewed Subsection (2) as a reiteration and explanation of subsection (1), rather than a separate provision addressing situations differing from those addressed by subsection (1). The Court stated:

> Moreover, there is nothing in the language of §933 to support ... [an] exception to the unqualified requirement that an employee obtain the consent of the employer and carrier for any settlement with a third-party tort feasor. To the contrary §933(g)(1) is brutally direct: "the employer shall be liable for compensation ... *only* if written approval of the settlement is obtained from the employer and the employer's carrier." (Emphasis added.) As if the language of §933(g)(1) weren't clear enough, the mandatory nature of the written approval requirement is reiterated in §933(g)(2) so that the two provisions frame an unmistakable scheme:
>
> If ... the worker desires to settle the claim for *less* than the total compensation owed by the employer, the worker must obtain the written approval of both the employer and its insurance carrier. [33 U.S.C. §933(g)(1).] If such approval is obtained, then the amount of the settlement reduces the amount of the employer's liability to the same extent that a judgment would. *Id.* If such approval is not obtained, "all rights to compensation and medical [the LHWCA] *shall be terminated,* regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter." *Id.* §933(g)(2); *Peters v. North River Insurance Co. of Morristown, N.J.,* 764 F.2d 306, 311-12 (5th Cir. 1985) (Emphasis in original.)[58]

Despite the clear language of the Fifth Circuit's opin-

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[58] 784 F.2d at 647; Emphasis in original.

ion in *Collier,* the Department of Labor remained unwilling to acceed to the clear judicial interpretation of §933(g).[59] The BRB, in its opinion below, stated:

> We reject employer's argument that *Petroleum Helicopters, Inc. v. Collier,* 784 F.2d 644, 18 BRBS 67 (CRT) (5th Cir. 1986), *rev'g.,* 17 BRBS 80 (1985) controls the instant case. As employer contends, the Court's opinion contains language to the effect that there is no exception to the written approval requirement of Section 33(g)(1).
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> The court in *Collier,* however, did not address the case where claimant is not a "person entitled to compensation" or the notice provisions of §33(g)(2). Thus, *Collier* is distinguishable from the instant case.[60]

The BRB continued to focus on its interpretation of "person entitled to compensation" in the context of 33(g) and apparently felt that unless those "magic words" were changed, their interpretation of the statute was still valid. If, however, there was any doubt, it has been removed by the Fifth Circuit's *en banc* decision in *Nicklos Drilling Co. v. Cowart,*[61] which is also its opinion in the instant case.

In *Nicklos,* the Fifth Circuit again addressed the Department of Labor's administrative interpretation of §33(g) in a situation where an employee has settled a claim for an amount *less* than the LHWCA compensation entitlement, without the express written approval of the employer. Both the Department of Labor and Petitioner herein argued that deference should be given the in-house

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[59] *See,* e.g. *Mary E. Barger (Widow of Walter Barger) v. Petroleum Helicopters, Inc. and American Home assurance Company,* Decision and Order, BRB No. 88-101, (November 22, 1989); Appendix "E" to the Petition for Certiorari.

[60] 4 F.2d at 647, 18 BRBS, at 72 (CRT).

[61] 927 F.2d 828 (5th cir. 1991).

administrative interpretation ennunciated in *O'Leary* and its progeny.[62] In examining this contention, the Fifth Circuit first examined general rules of statutory construction and specifically this Court's recent opinion in *Demarest v. Manspeaker,* __U.S.__, 111 S.Ct. 599, 112 L.Ed. 2d 608 (1991), where the Court unanimously declined to give effect to a "longstanding administrative construction" in the face of clear statutory language granting witness fees to incarcerated state prisoners who testify in federal court proceedings:

> When we find the terms of a statute unambiguous, judicial inquiry is completed except in rare and exceptional circumstances. ... We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it.[63]

Based on this criteria, the Fifth Circuit examined the Department of Labor's contention that the statute was ambiguous and, therefore, its administrative interpretation should be favored. The Department of Labor advanced two arguments: (1) that its interpretation was based on Congressional desire to eliminate the financial hardship attendant to election of remedies; and, (2) that its interpretation was necessary to give meaning to the phrase "or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person."[64] The first argument was rejected. More on point

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[62] Significantly, all of the opinions cited by Petitioner in supporting *O'Leary* are from the BRBS and the Administrative Law Judge. We have found no appellate court which has published an opinion following *O'Leary.*

[63] 927 F.2d at 431-2.

[64] 33 U.S.C. §933(g)(2).

to the case at hand is the Fifth Circuit's statement concerning the second argument, which is the argument advanced by Petitioner herein:

> While superficially persuasive, OWCP's argument cannot stand careful scrutiny. First, the quoted phrase is necessary because it extends the notification requirement to judgments. Second, the quoted phrase requires that the claimant notify the employer of *any* settlement or judgment whatever. As we note above, prior written approval is required only if, as §33(g)(1) provides, the amount of the settlement is "less than the compensatiion to which the [claimant] would be entitled under this chapter." Congress intended to require prior written approval in the limited circumstance where a claimant settles for an amount smaller than his LHWCA compensation entitlement. By contrast, only notification is required when a claimant receives a judgment or settles for an amount exceeding his LHWCA compensation entitlement. Congress' schemes of approval and notification dovetail perfectly; there is no ambiguity.[65]

Accordingly, the Fifth Circuit held as follows:

> After carefully considering the permissibility of OWCP's administrative interpretation in light of the plain language of §33, we conclude that Congress has spoken unambiguously and so as to leave no room for such embroidery. We therefore hold, in accord with the clear terms of the statute, that §33's prior written approval requirement applies regardless of whether the employer or its carrier was paying LHWCA benefits at the time

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65 *Nicklos Drilling Co. v. Cowart*, 927 F.2d at 831-2 (emphasis in original).

of settlement.[66]

The Fifth Circuit's resolution of this issue is clear and unmistakable. It reflects the unambiguous Congressional intent in drafting §33(g). It is in accord with the previous published opinions concerning the entitlement language contained in the LHWCA. The Petitioner's argument to the contrary is not correct. Accordingly, the Petition for Certiorari should be denied.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

Petitioner has attempted to argue that the Fifth Circuit's opinion in *Nicklos*[67] is in conflict with what she terms to be the Ninth Circuit's decisions in *O'Leary* and *Bethlehem Steel Corp. v. Mobley*[68] In actuality, there is no conflict; rather, published opinions are clearly in accord.

The opinion of the Benefits Review Board in *O'Leary* was affirmed by the Ninth Circuit. However, that affirmance was by an unpublished opinion. According to the rules of the Ninth Circuit:

> Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders except when relevant under the doctrines of law of the case, *res judicata* or collateral estoppel.[69]

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[66] *Id.*

[67] *Supra.*

[68] 927 F.2d 558 (9th Cir. 1990).

[69] Rule 36-3, United States Court of Appeals (9th Cir.).

Thus, under the clear wording of the Rules of the Ninth Circuit, the unpublished opinion affirming *O'Leary* is not precedent and therefore cannot define the law in that Circuit.

Returning to the Ninth Circuit's opinion in *Bethlehem Steel Corporation v. Mobley,* it is clear after reading the entire opinion (not just those portions cited in the Petition for Certiorari), that the views of the Ninth Circuit dovetail perfectly with those of the Fifth Circuit. In examining the workings of 33(g), the Ninth Circuit stated as follows:

> Section 33(g)(1) requires persons "entitled to compensation" to obtain written permission from their employers before entering into third-party settlement for an amount "less than the compensation" for which they are entitled under the LHWCA. If a claimant fails to obtain an employer's prior written approval of the settlement, the claimant forfeits all rights to compensation and medical benefits under the LHWCA. 33 U.S.C. §933(g)(2).[70]

The Ninth Circuit obviously read both sections of 33(g) together and concluded, as did the Fifth Circuit, that they form one organic whole. The Ninth Circuit, however, determined that §33(g)(1) did not operate to cut off Mobley's benefits because he settled for an amount in *excess* of the compensation to which he was entitled, *not* because he was allegedly not a "person entitled to compensation".[71]

The Ninth Circuit also observed that since Mobley's claim was for only medical benefits, and 33(g) would only apply to claims for compensation, 33(g) would not apply in any event. Accordingly, the Ninth Circuit held that

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[70] *Bethlehem Steel Corp. v. Mobley,* 920 F.2d at 560.

[71] *Id.*

Mobley's claim was not barred under §933(g)(2) as he gave sufficient notice to protect his employer's rights to set off a recoupment under the LHWCA.[72]

It is abundantly clear that the only *published* opinions of the Fifth Circuit and Ninth Circuit (the only circuits to directly address this particular issue), are in accord. In the limited circumstance where an employee settles for an amount *less* than the compensation to which he or she may be entitled, written approval is always required.[73] However, when the settlement is for more than the amount of compensation, notice is all that is required.[74] Accordingly, inasmuch as there is no conflict in the circuits, the Petition for Writ of Certiorari must be denied.

III. THE FIFTH CIRCUIT'S DECISION WILL NOT HAVE DISASTROUS CONSEQUENCES.

Petitioner is attempting to raise a "parade of horribles" in an attempt to sway this Court to grant Certiorari. Not only are the arguments in question specious but, as stated, they fly in the face of the clear wording of the statute.

First, Petitioner argues that the effect of the Fifth Circuit opinion will be to dispossess claimants who relied on *O'Leary* and create claims for reimbursement, as she argues the Fifth Circuit opinion is a new interpretation of existing law. Petitioner's argument misses the point. As discussed *supra*, the interpretation of §33(g) as enunciated by Congress and the Article III courts has not changed. What has been *corrected* is an erroneous administrative in-

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[72] Id. at 561.

[73] *Nicklos, supra*, at 832; *Mobley, supra* at 560.

[74] *Id.; Mobley, supra*, 920 F.2d at 561-2.

terpretation of 33(g) which Congress clearly repudiated by virtue of the 1984 amendments, but which the Department of Labor failed, or was unwilling, to recognize. The point is that Congress, from the legislative history cited *supra*, never intended for that such claimants receive further benefits. They may have received a windfall, but this was against the intent of Congress and contrary to the express wording of the statute.

With regard to pending claims and the argument of economic duress as a result of the opinion below, claimant is again attempting to use the same result oriented argument that has been advanced by the Benefits Review Board and rejected by Congress and the Fifth Circuit. Claimant is also ignoring the fact that, in the statute itself, there are provisions penalizing an employer who does not pay compensation which is due and owing to an employee.[75] Congress has clearly and separately dealt with the matter of economic duress and recalcitrant employers. It is not up to the Department of Labor to broaden the scheme which Congress has so carefully put together by adding penalties which are not found in the statute.

Finally, with regard to future claimants, the situation posited by Petitioner is clearly one which cannot exist. Petitioner refers to employees with occupational diseases who have contracted a disease but who are not currently disabled and are, therefore, not entitled to compensation. Petitioner claims that, since these employees are not disabled, they do not know which future employer to obtain approval from, so they settle their third party cases at their peril under petitioner's interpretation of *Nicklos*. The flaw in petitioner's reasoning is that if the employee is not disabled and therefore not entitled to compensation by definition of the statute, the proscriptions in §33(g) would not apply. The statute requires disability in order for one

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[75] 33 U.S.C. §§914, 938.

to be "entitled to compensation". Claimants in the position advanced by Petitioner will have no worry about the effect of §33(g) when settling their claims, since they will not have invoked the provisions of the Act.

The Fifth Circuit has merely stated what the law is. It has not changed the law, or even clarified it. The Fifth Circuit has merely corrected an erroneous administrative misinterpretation.

CONCLUSION

Respondents submit that Petitioner has advanced no reason to grant certiorari in the captioned case. The legislative history and the statute are clear in meaning. There is no conflict in the circuits and the Fifth Circuit's decision does nothing more than place into effect what Congress intended. The only possible reason to grant certiorari would be to ensure that the law applied by the Department of Labor is that intended by Congress and that the law is uniformly applied across the United States and not subject to administrative whims and abberations, depending on whether or not the claim arises within the geographic and jurisdictional limits of the Fifth Circuit.

Respectfully submitted,

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